Trial Practice	Professor Marjorie Aaron	A+

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Capital Punishment	Attorney Richard Cline	S		
Criminal Procedure I	Dean Emeritus Louis Bilionis	S		
Innocence Project	Attorney Mallorie Thomas	S		
Moot Court Competition	Professor Christopher Bryant	S		
Sales	Professor Emily Houh	S		
Trial Practice	Professor Marjorie Aaron	S		

Due to the Coronavirus pandemic, all courses switched to a Satisfactory/Unsatisfactory grading scale. This was not factored into our GPA or rank.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OFFICE OF THE CLERK
MOTIONS SECTION

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Senior Motions Attorney
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August 11, 2020

Dear Judge,

I write you in reference to Ariel Shuster's application for a clerkship with you. Ariel is a summer intern with the Motions Unit for the United States Court of Appeals for the Sixth Circuit whose term has been extended throughout her third year of law school on a part-time basis because of her exemplary performance.

Ariel writes memoranda and proposed orders to one-judge and three-judge panels in civil, criminal, and agency law appeals. Although not always familiar with the underlying area, she is quick to focus on the relevant issue(s). Her research of those issues is thorough and on point. Her writing is strong, and she regularly proofs the work of other attorneys and interns, checking for proper punctuation and grammar, citation format, and citation to authorities. She handles multiple matters at once, prioritizes those matters, and doesn't miss a beat. Perhaps most importantly, Ariel consistently takes initiative. As a result, she has been assigned procedurally difficult cases involving frequent or vexatious litigators requiring her to work with personnel outside our unit. Unsurprisingly, those she has worked with in other units praise her as well.

Although Ariel's work proves she will be an asset to your chambers, she also has experience in other areas demonstrating her abilities, including the United States Attorney's Office for the Southern District of Ohio. Her knowledge of both the trial and appellate courts gives her a unique insight into handling a case through its pendency, even when matters are pending at multiple levels. Further, she began working for the court during Ohio Governor DeWine's restrictions in response to COVID-19. The limitations that one might expect following remote training and beginning an internship teleworking did not slow Ariel down in the least.

If you would like to discuss Ariel's qualifications in further detail, I would be happy to talk to you.

Sincerely,

Kate Gallagher
Senior Motions Attorney

U.S. Department of Justice
United States Attorney
Southern District of Ohio

221 East Fourth Street
Suite 400
Cincinnati, Ohio 45202

Telephone: (513) 684-2482
Fax: 513-684-6385

June 9, 2020

It is my pleasure to highly recommend Ariel Shuster for the position of judicial clerk in your chambers.

I worked with Ms. Shuster during her internship from October 2019 to May 2020 at the US Attorney's Office in the Southern District of Ohio where I am employed as a Special Assistant to the US Attorney. During this time, Ms. Shuster was a great help to me for the thoroughness of her legal research and acuity of her editorial notes. In response to my research queries over the course of several projects, Ms. Shuster consistently returned answers both thoroughly investigated and considered and, also impressively, after only a short period of time. Even when I had interrupted her while performing a research project for another attorney, it was still the case that I would find her response memorandum back to me often before the end of the day. In these, she did not simply recite her findings, but contextualized them in the breadth of relevant case law, outlining as well the most pertinent counterarguments to the government's position.

Ms. Shuster also showed great aptitude as an editor in reviewing several motions of mine in various cases. In each, she impressed me with the confidence and facility of her notes. On the first of these projects, on which I had simply asked her to read through and identify any confusing passages, she instead handed back a full line edit with suggestions regarding organizational structure, clarity of language, and matters of tone. It was because of this performance I came to trust her for input on subsequent writing projects, and she continued to improve the quality of my briefs. Indeed, I'm sure this letter would benefit from her influence.

In addition to the work Ms. Shuster put in in her capacity as an intern, I was taken even more with her thoughtful consideration of the legal and factual scenarios that came up in our work together. I know Ms. Shuster to both have a sincere interest in working as an Assistant US Attorney, and to be heavily involved in the Innocence Project at the University of Cincinnati where she attends law school. Unsurprisingly, then, in many discussions with Ms. Shuster I found her to be considerate of not just what would likely happen in a given case, but what should—an excellent quality for a prosecutor (and in general), and one I believe will serve her very well as a judicial clerk. The breadth of Ms. Shuster's curiosity and intelligence was evident from her work output in our office, and I look forward to its further investment into the legal community.

For these reasons I highly recommend Ms. Shuster for this position of judicial clerk and will be happy to follow up with any more information those concerned would like.

Zach Kessler
Special Assistant United States Attorney
United States Attorney's Office
Southern District of Ohio
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United States Attorney
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Fax: 513-684-6972

June 9, 2020

Re: Recommendation for Ariel Shuster

Dear Sir or Ma'am:

I write to most highly recommend Ariel Shuster for a judicial clerkship. Ms. Shuster is a woman of dedication and character, and her legal work for my office was extraordinary.

I, along with fellow AUSAs, supervised Ms. Shuster as a legal extern with the United States Attorney's Office for the South District of Ohio. In that capacity, she assisted me and others with various projects, including but not limited to, drafting court filings and preparing for court proceedings and depositions. Ms. Shuster was instrumental in drafting several motions and replies in support of summary judgment in employment discrimination cases that were submitted to the United States District Court for the Southern District of Ohio. Ms. Shuster worked independently and under time restraints to produce final products that were well-written, legally sound and persuasive.

Equally important, Ms. Shuster showed a remarkable dedication to her work at the U.S. Attorney's Office and the challenge of working remotely presented by the COVID-19 pandemic while balancing a full course load as a second-year student at the University of Cincinnati College of Law.

Simply put, Ms. Shuster exemplifies the characteristics for the finest practice of law in federal court. She is dedicated, smart and hard-working. I am pleased to recommend her for a judicial clerkship position.

Very truly yours,

DAVID M. DEVILLERS
United States Attorney

s/ *Margaret A. Castro*
MARGARET A. CASTRO
Assistant United States Attorney

This writing sample contains excerpts from a Motion for Summary Judgment which I drafted in its entirety. As a brief summation of the facts, Plaintiff, Dearie Cheatham, filed a claim against the United States Postal Service on multiple grounds of discrimination. Plaintiff suffered a workplace injury and was granted medical leave. Upon her ability to return to work, the postal service did not have a position available. While Plaintiff was eventually offered a modified light duty position, this took approximately a year to accomplish. It is Plaintiff's contention that this delay is grounds for relief. The Government believes that the Postal Service's actions or inactions were not discriminatory nor retaliatory and thus there are no legal grounds for relief.

MEMORADUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

This case involves Plaintiff, Dearie Cheatham, an employee of the Defendant, the United States Postal Service (the "Postal Service" or "USPS"), who alleges that the Postal Service discriminated against her based upon race (African American) and sex (female) in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e-2(a) and § 2000e-3(a) *et seq.*, upon disability (foot impairment) in violation of the Rehabilitation Act, 29 U.S.C. §791 *et seq.*, and upon age (over forty) in violation of the Age Discrimination in Employment Act of 1967 (the "ADEA"), 42 U.S.C. § 621 *et seq*. The Plaintiff also outlines claims under the Family Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq.*, and for retaliation stemming from her allegations of discrimination.

The Postal Service denies that it discriminated or retaliated against the Plaintiff. The employment actions at issue here were not motivated by the Plaintiff's race, sex, disability or age. Nor were such decisions made in retaliation for Plaintiff's use of medical leave under the FMLA or Plaintiff's request for reasonable accommodation. Rather, each of the employment actions were taken for legitimate, non-discriminatory reasons and were not pretext for prohibited discrimination or retaliation.

For these reasons, the Court should grant summary judgment for the Defendant under Federal Rule of Civil Procedure 56.

STATEMENT OF PROPOSED UNDISPUTED MATERIAL FACTS

[*Not included in this excerpt …*]

ARGUMENT

[*Beginning summary of argument is not included in this excerpt …*]

A. The Postal Service Did Not Discriminate Against the Plaintiff Because of Her Race, Sex or Age.

Title VII of the Civil Rights Act prohibits discrimination on account of race, sex, or color. 42 U.S.C. § 2000e *et seq*. A plaintiff can rely on direct or indirect evidence to prove her claim. *Tennial v. United Parcel Serv*., 840 F.3d 292, 302 (6th Cir. 2016). Where a plaintiff lacks direct evidence of discrimination, courts apply the *McDonnell-Douglas* burden-shifting framework. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). In the first step, the plaintiff must make out a *prima facie* case of racial, sexual, or color discrimination. This requires that the plaintiff "show that he (1) was a member of a protected class, (2) subjected to an adverse employment outcome, (3) qualified for the position, and (4) was replaced by someone outside the protected class or was treated differently than similarly situated non-protected employees." *Tennial*, 840 F.3d at 303. If the plaintiff satisfies this threshold showing, the burden shifts to the defendant "to articulate a legitimate, non-discriminatory reason" for the negative employment outcome. *Id.* The burden then shifts back to the plaintiff to prove that the explanation provided for the adverse employment outcome is pretextual. *Id.*

Likewise, in the ADEA context, the *McDonnell Douglas* evidentiary framework requires that Plaintiff set forth a *prima facie* case of age discrimination showing that she was, "1) at least forty years old at the time of the alleged discrimination, 2) subjected to an adverse employment action, 3) qualified for the position, and 4) replaced by a substantially younger person or otherwise disparately treated." *Mencarelli v. Alfred Williams & Co.*, 656 F. App'x 80, 84 (citations omitted).

Summary judgment is appropriate here because Plaintiff's discrimination claims fail at every step of the burden-shifting framework for race, sex, and age.

1. *The Postal Service Did Not Take Adverse Employment Actions Against Plaintiff.*

In order for a plaintiff to establish a prima facie claim of discrimination or retaliation under Title VII, one of the elements that the plaintiff must demonstrate is that she was the subject of a "materially

adverse employment action." *See White v. Burlington Northern & Santa Fe R. Co.*, 364 F.3d 789, 796 (6th Cir. 2004), *aff'd sub nom. Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (citing *Geisler v. Folsom*, 735 F.2d 991 (6th Cir. 1984)). "[E]mployment actions that are de minimis are not actionable under Title VII," and this requirement "prevent[s] lawsuits based upon trivial workplace dissatisfactions." *Id.* at 795 (internal citations omitted); *see Primes v. Reno*, 190 F.3d 765, 767 (6th Cir. 1999) ("If every low evaluation or other action by an employer that makes an employee unhappy or resentful were considered an adverse action, Title VII would be triggered by supervisor criticism or even facial expressions indicating displeasure"); *see also White*, 548 U.S. at 68 (Title VII "does not set forth a general civility code for the American workplace.") (internal citation and quotations omitted).

The Sixth Circuit has defined an adverse employment action as a "materially adverse change in the terms and conditions of employment," which typically includes "a decrease in wage or salary, a less distinguished title, a material loss of benefits, or other indices that might be unique to a particular situation." *Blackburn v. Shelby County*, 770 F. Supp. 2d 896, 919 (W.D. Tenn. 2011) (citing *Hollins v. Atl. Co.*, 188 F.3d 652, 662 (6th Cir. 1999)). A plaintiff's subjective view of the employment action is not controlling; the question is whether a reasonable person under the circumstances would consider the action to be materially adverse. *Id.*

The definition of a materially adverse employment action is similar, but not identical, in retaliation and discrimination claims. In the context of a retaliation claim, the relevant question is whether the employer's actions would have "dissuaded a reasonable worker" from access to Title VII's remedial mechanism. *See Michael v. Caterpillar Financial Services Corp.*, 496 F.3d 584, 593-94 (6th Cir. 2007); *see Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 54 (2006). The burden under a retaliation claim is less onerous than demonstrating an adverse employment action in the anti-discrimination context, but still relies on an objective standard for evaluating the employment action. *Johnson v. Donahoe*,

642 Fed. Appx. 599, 603 (6th Cir. 2016). Here, the Postal Service's employment decisions do not constitute a materially adverse employment action under either standard.

Plaintiff informed the Defendant that she was permitted to return to work on February 15, 2016. At this time, Plaintiff was required by the Employee and Labor Relations Manual section 355 to submit a written request for a light duty assignment to the Installation Head. (Exhibit 5, ROI, p. 470). Plaintiff filed no such request. As such, the Postal Service did not initiate a job search for July 17, 2017. Plaintiff also requested payment from the Department of Labor and was denied because her medical documentation had yet to be approved. Again, compensation or an offer of modified work could not be provided until her medical information was in order. On August 1, 2017 Plaintiff requested a Reasonable Accommodation meeting to address her desire for modified work; his meeting was held on September 18, 2017. After providing updated medical information, Plaintiff was offered modified light duty work within her restrictions. None of these actions constitute an adverse employment action because there was no change in the terms of conditions of Plaintiff's employment at this time. Additionally, no reasonable person, under these circumstances, would consider the steps taken by Postal Service to be materially adverse as it was attempting to find accommodations for Plaintiff.

A delay in receipt of an accommodation is not a materially adverse employment action. Where there is no evidence that similarly situated employees were treated differently, a delay cannot be deemed retaliatory. *Brooks v. City of San Mateo*, 229 F.3d 917, 929 (9th Cir. 2000). In *Brooks*, the plaintiff's worker's compensation claim was delayed 90 days. The Ninth Circuit noted that because the plaintiff failed to provide other employees who were treated differently in their worker's compensation claims, the delay could not constitute retaliation. *Id.* Similarly, when a person is delayed in receiving a promotion, the court will not deem this to be a retaliatory action when the promotion has been granted once the individual was finally eligible. *Momah v. Dominguez*, 239 F. App'x 114, 125 (6th Cir. 2007). In *Momah*, the plaintiff sought relief partially because of a delay in promotion. *Id.* However, since the employer promoted the plaintiff when he became eligible, and the plaintiff provided no evidence to rebut this eventual promotion, the court dismissed this claim. *Id.* Applying the *Burlington* standard, the First Circuit has noted that a delay

in providing reasonable accommodation can be deemed retaliatory when "a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Carmona-Rivera v. Puerto Rico*, 464 F.3d 14, 20 (1st Cir. 2006); See *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 68 (2006). In *Carmona-Rivera,* the plaintiff was a teacher requesting reasonable accommodation at her employer school. The school eventually provided the requested accommodations, yet not in the time frame the plaintiff preferred. *Id.* The First Circuit noted that while the delay was an inconvenience, the eventual providing of the accommodations and the lack of evidence showing any retaliatory intent resulted in a denial of the claim. *Id.* Additionally, "the fact remains that the school took steps to meet her requests and did not stonewall her." *Id.*

The Postal Service took steps to meet Plaintiffs request and did not stonewall her. After informing USPS of her ability to return to work, USPS employees continued to search for work within Plaintiff's restrictions. HRM Specialist Evon Clark was in contact with Cliff Logan and Jim Price about Plaintiff's request. Plaintiff could not be returned to work at the Dayton Call Center due to a previous settlement. Plaintiff also was not able to return to her previous post with the Corryville Post Office because there was no work available at the location within her work restrictions. USPS held two reasonable accommodation meetings with Plaintiff and eventually offered her the modified work she sought. No reasonable employee would see the actions taken by USPS and be dissuaded from making or supporting a charge of discrimination. Providing Plaintiff with reasonable accommodations may have been a long process, but because Plaintiff did eventually receive the accommodations she sought, and there was no retaliatory intent which would dissuade a reasonable person from pursing a claim, the delay cannot be deemed an adverse employment action.

2. *Plaintiff was not qualified for the position at issue.*

Plaintiff's discrimination claims also fail at the initial *prima facie* stage because she has not adduced any evidence that she was qualified for the position at issue. The Postal Service would have had to eliminate the essential functions of Plaintiff's position in order to accommodate her medical restrictions, as

she was completely unable to stand during work and unable to lift while standing, due to her medical condition. The Plaintiff, when asked to specify the accommodation(s) she was requesting, proposed a sit down job at the Corryville Post Office or primary job at the main post office, perhaps an internal office job or some light driving. Unfortunately, these accommodations suggested by the Plaintiff would not permit her to perform the essential functions of her position, as they would not overcome her standing and lifting restrictions. "If an employee seeks to stay in his or her current job, the term reasonable accommodation means: 'Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position [to stay in the position].'" 29 C.F.R. § 1630.2(*o*). "A suggested accommodation is not reasonable if it requires eliminating an "essential" function of the job." *Id.; see also* 42 U.S.C. § 12111(8); *Rorrer v. City of Stow*, 743 F.3d 1025, 1039 (6th Cir. 2014). Essential functions are "the fundamental job duties of the employment position the individual with a disability holds or desires. *Id*. Not only must the employer be able to accommodate the individual without undue hardship but the employer is not required to accommodate an individual by eliminating the essential functions of her job or by creating a job not already existing within the organization, including a light duty position. *Watson v. Lithonia Lighting and National Service Industries. Inc*., 304 F.3d 749 (7th Cir. 2002); *Turco v. Hoechst Celanese Corporation*, 101 F.3d 1090, 1093-1094 (5th Cir. 1996); *Shiring v. Postmaster General*, 90 F.3d 827, 831-832 (3rd Cir. 1996).

Because there was no evidence provided that would establish a plausible reasonable accommodation that would permit the Plaintiff to perform the essential functions of her position, she has failed to satisfy the third element of a *prima facie* case of disability discrimination based on a failure to accommodate.

3. *Plaintiff was not treated differently than similarly-situated non-protected employees.*

Plaintiff's discrimination claims also fail at the initial *prima facie* stage because she has not adduced any evidence that she was treated differently than similarly-situated, non-protected employees, and thus no

inference that any action taken against her was motivated by race, gender, disability, or age. In order to create a valid comparison, a plaintiff must first establish that the comparable employees were "similarly situated in all *relevant* respects." *Wright*, 455 F.3d at 710. Individuals with whom the plaintiff seeks to compare her treatment "must have dealt with the same supervisor, have been subjected to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992).

Here, Plaintiff has not identified other USPS employees that were similarly situated, non-protected, and treated more favorably than her. Similarly situated employees "with whom the plaintiff seeks to compare himself or herself must be similar in all of the relevant aspects." *Gibson v. Shelly Co*., 314 F. App'x 760, 771 (6th Cir. 2008) citing *Ercegovich v. Goodyear Tire & Rubber Co*., 154 F.3d 344, 352 (6th Cir. 1998). Therefore, Plaintiff would need to provide an employee who was similarly situated in disability, race, gender or age and was in turn treated differently than Plaintiff. Yet, Plaintiff contends that because unnamed male employees who worked at the Dayton Call Center with her were employed after the Dayton Call Center closed, that it constitutes discrimination. Plaintiff does not provide any information about these employees-their names, position, race, gender, age, or qualifications. As a result, the Plaintiff fails to prove the fourth element of a *prima facie* case of discrimination.

B. The Postal Service's Employment Decisions Were Based on Legitimate, Non-Discriminatory and Non-Pretextual Reasons.

Even if the Plaintiff could establish a *prima facie* case, summary judgment is still appropriate because the actions about which she complains were taken for legitimate, nondiscriminatory, and non-pretextual reasons. *See Raytheon Co. v. Hernandez*, 540 U.S. 44, 53–55 (2003). In order to demonstrate pretext, a plaintiff must show that a defendant's articulated reasons: (1) had no basis in fact, (2) did not actually motivate the action taken, or (3) were insufficient to motivate the action taken. *King v. Buckeye Rural Elec. Co-op*, 211 F.3d 1269, 2000 WL 491517, *5 (6th Cir. Apr. 20, 2000). A plaintiff's own self-serving allegations are not enough to meet this burden, and are insufficient to avoid summary judgment.

See Johnson v. Washington Cty. Career Ctr., 982 F. Supp.2d 779, 788 (S.D. Ohio 2013) (Marbley, J.) ("'But self-serving affidavits alone are not enough to create an issue of fact sufficient to survive summary judgment.")

Every action taken by the Postal Service was for a legitimate and nondiscriminatory reason. Where a plaintiff has not demonstrated she could safely and substantially perform her job's essential functions with or without a reasonable accommodation, a *prima facie* case of discrimination cannot exist. *Bare v. Fed. Exp. Corp*., 886 F. Supp. 2d 600, 610 (N.D. Ohio 2012). In *Bare*, the District Court held that the plaintiff's essential job functions with the Federal Express required her to do far more than what her medical restrictions would allow. *Id*. Her restrictions would allow her to lift no more than 20 pounds when the job required the ability to lift 75 pounds. *Id*. "By Bare's own testimony and by her own doctor's orders, she was not qualified to perform her job or any other open position at the time of her termination." *Id*. at 610-11. Additionally, Bare was not able to show that there were any positions available within her restrictions at the time of her termination. *Id*. at 611. Her employer was also not required to create a new positon for her. *Id*. The employer justified the termination "on the basis that she exhausted her available leave time, could not report to work or perform any open jobs at Federal Express with the restrictions imposed by her physician, and did not even express an interest in any open jobs, with or without accommodations during the relevant period." *Id*. at 612. These were all nondiscriminatory and legitimate reasons for which the plaintiff could not rebut with any pre-textual evidence. *See also, Mullet v. Wayne–Dalton Corp.*, 338 F.Supp.2d 806, 817 (N.D.Ohio 2004) (holding termination of an employee who is unable to return to work and has exhausted available leave under an employer's policy is a legitimate, nondiscriminatory reason for termination); *Hillery v. Fifth Third Bank*, No. 2:08–CV–1045, 2010 WL 1963408, at *8 (S.D.Ohio May 17, 2010) (employee's own failure to apply for posted position provided a legitimate, nondiscriminatory reason for not promoting employee). *Id*. at 612.

On April 15, 2016, and April 28, 2016, emails were sent from U.S. Postal Service Health and Resources Management ("HRM") Specialist Annette Clark, explaining that she had received medical documentation indicating that Plaintiff had been released to return to work on February 15, 2016, with

restrictions. The restrictions required Plaintiff work only 4 hours daily, perform sedentary work only, lift no more than 10 lbs., sit only, and has to wear a cam boot. Then on April 28, 2016 an email from Clifford Logan to Corryville Manager Price and Supervisor, Amy Daugherty, indicated that the Department of Labor had accepted the Plaintiff's surgery as job related and requested a search for work, with Plaintiff's limitation for sit down work only. A search was initiated. Plaintiff inquired about returning to the Corryville location yet there, her previous essential job functions required standing, sorting, carrying and throwing mail, etc. At this time, there was no modified work within her restrictions available at the Corryville location. This was not a decision made by the Postal Service for a discriminatory purpose. There simply was no work available as requested by Plaintiff, within her restrictions. This was a legitimate and nondiscriminatory reason for not providing Plaintiff the specified work.

A letter from Plaintiff's attorney to Ms. Funderburg, dated August 1, 2017, requested reasonable accommodation to enable Plaintiff to return to work with restrictions. On August 25, 2017, Ms. Funderburg responded requesting relevant information regarding a request for reasonable accommodation, specifically that Plaintiff complete RAC Form A, Reasonable Accommodation Request, and that she have her medical provider complete RAC Form B, Medical Information & Restriction Assessment. An initial Reasonable Accommodation meeting was held on September 19, 2017 at which time the Postal Service again requested additional medical information. This additional information was provided on October 9, 2017 to which another job search within Plaintiff's restrictions was requested by the Postal Service. The modified work which Plaintiff sought was offered on November 20, 2017 and denied by Plaintiff's attorney on November 28, 2017.

Plaintiff believed that her race, sex, age and disability were all factors in her not being accommodated. However, there is absolutely no evidence to indicate that any action taken by the Postal Service was for any reason other than following procedure in attempting to locate work for Plaintiff. In her deposition, Plaintiff clearly states that no one at Postal Service ever indicated that the actions taken towards her were because of her race, sex, age, or disability. Plaintiff noted the following:

Q: How were your coworkers?

> A: Loved them. I didn't have a problem with co-workers, managers, supervisors. Respect. I respected them, they respected me.

(Exhibit 2, Deposition of Cheatham, 44:9-11.) Additionally, Plaintiff noted that no statements were ever made to or around Plaintiff that indicated her position was a result of her race, sex, age, or disability. Rather, every action had a legitimate purpose that resulted in Plaintiff being offered the modified work she sought. Plaintiff has provided no pre-textual reason for any of the legitimate and nondiscriminatory actions taken by USPS.

For these reasons, the Postal Service satisfies its burden in showing a legitimate, non-discriminatory and non-pretexual reason for its actions.

C. The Postal Service Did Not Retaliate Against the Plaintiff.

[*Not included in this excerpt* ...]

D. The Postal Service Did Not Discriminate Against the Plaintiff Based on Her Disability.

[*Not included in this excerpt* …]

E. There Was No Violation of the Family and Medical Leave Act.

[*Not included in this excerpt* …]

CONCLUSION

For all the reasons above, the Defendant respectfully requests that the Court grant summary judgment pursuant to Federal Rule of Civil Procedure 56 and dismiss this case with prejudice.

Applicant Details

First Name	**Noah**
Middle Initial	**L**
Last Name	**Skavhaug**
Citizenship Status	**U. S. Citizen**
Email Address	**noah.l.skavhaug@und.edu**
Address	**Address** **Street** **2150 47th Ave S Apt 432** **City** **Grand Forks** **State/Territory** **North Dakota** **Zip** **58201** **Country** **United States**
Contact Phone Number	**7013301750**

Applicant Education

BA/BS From	**University of North Dakota**
Date of BA/BS	**May 2019**
JD/LLB From	**University of North Dakota School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=43501&yr=2011**
Date of JD/LLB	**May 7, 2022**
Class Rank	**30%**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/ Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Giles Sutherland rich Memorial Moot Court Competition**

Seigenthaler-Sutherland Cup National Moot Court Competition

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Datzov, Nikola
nikola.datzov@und.edu
Dauphinais, Kristen
kirsten.dauphinais@und.edu
Ernst, Julia
julia.ernst@und.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Noah L. Skavhaug

2150 47th Ave S Apt 432 • Grand Forks, ND 58201 • (701)330-1750 • noah.l.skavhaug@und.edu

April 10, 2022

Dear Judge Hanes,

I am Noah Skavhaug, a third-year law student at the University of North Dakota where I am the External Director for the Moot Court program. I write to apply for a clerkship in your chambers at the United States District Court for the District of Idaho for the 2022-2024 term.

Enclosed you can find my resume, undergraduate transcript, legal transcript, and writing sample. The writing sample is an excerpt from a white paper I wrote for Legislation class. It delves into different forms of law to determine a way for Congress to adopt a federal allowance for physician assisted suicide of terminally ill persons. Associate Dean Ernst can attest to the quality of the paper in her letter of recommendation.

I also participated twice in external moot court where I competed in a First Amendment and an Intellectual Property competition. During these competitions I learned invaluable skills in both writing and oral advocacy. Professor Dauphinais was my coach during the First Amendment competition, and Professor Datzov was during the Intellectual Property competition. Both Professor Dauphinais and Datzov can attest to my skill as a writer and competitor in their letters of recommendation.

I hope I have the chance to interview with you and potentially work for you later this year.

Respectfully,
Noah Skavhaug

Noah L. Skavhaug

2150 47th Ave S Apt 432 • Grand Forks, ND 58201 • (701)330-1750 • noah.l.skavhaug@und.edu

Education

University of North Dakota School of Law — Grand Forks, ND

- Juris Doctor, Expected May 2022
- GPA: 3.011
- Highest Grade Award: First Amendment
- 2021-2022 Moot Court Board External Director
- 1L Oral Argument Volunteer Judge

University of North Dakota — Grand Forks, ND

- Bachelor of Science, 2019
  - Major: Chemistry (Biochemistry Emphasis)
  - Minor: Mathematics
  - GPA: 3.333

Professional Experience

Tentinger Law Firm, *Legal Clerk* — Apple Valley, MN

- Drafted legal arguments in preparation for trial — Sep 2021 – Nov 2021
- Drafted memoranda that were used for legal briefing

Appareo Systems, *Legal Assistant* — Fargo, ND

- Assisted in discovery requests for a civil trial — May 2020 – Aug 2020
- Collaborated with legal counsel to develop best methods for discovery
- Negotiated favorable contract provisions with multiple engineering companies
- Created generic multi-use contracts with favorable provisions for the company

First Care Health Center, *Certified Nursing Assistant* — Park River, ND

- Primary care of patients in the hospital and emergency room — Jul 2016 – Aug 2019
- Trained CNA and NA candidates
- Performed routine housekeeping tasks

Mehedi Lab, *Undergrad Laboratory Assistant* — Grand Forks, ND

- Performed biological data quantification — Aug 2018 – May 2019
- Used and maintained a state-of-the-art microscope
  - Created protocols on microscope usage and image capture
  - Guided other lab members and other labs on the microscope protocols
- Performed and quantified western blots
- Participated in weekly lab meetings
  - Discussions with lab members and instructor
  - Discussions with other invited professionals
  - Presented data and information from individual research
- Set up a job shadow for a high schooler with my lab instructor

Smoliakova Lab, *Undergrad Laboratory Assistant* — Grand Forks, ND

- Performed organic chemistry experiments — Aug 2018 – Dec 2018
  - Organopalladium chemistry
- Participated in discussion with grad students and lab instructor
- Performed experiments that confirmed/helped the graduate student's research

Other Experience

- Certification in Nursing Assistance — May 2016 – Aug 2019
- CPR Certified — June 2016 – Aug 2019
- Tutor of Mathematics at Park River High School — Fall 2017
- Higher Education Advocate Speaker — Winter 2019

UND SCHOOL OF LAW
UNIVERSITY OF NORTH DAKOTA

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April 19, 2022

Dear Judge:

I write in support of Noah Skavhaug's application for a clerkship in your chambers. I have known Noah as a student at the University of North Dakota School of Law since the Fall 2020 semester. In my time getting to know Noah, I have learned that he exhibits a wonderful personality, dedication to success, and passion for intellectual property. In light of his interests, skills, and background, I believe that he would be an asset to your chambers.

Over the last two years, I have had the pleasure of getting to know Noah in the two courses he took from me and as a key member of the UND IP Moot Court team, which I coached this year. During two years filled with challenging circumstances due to the COVID-19 pandemic, Noah continued to make strides in becoming a well-rounded attorney. As a 2L, Noah was a model student in my Intellectual Property course. He was a frequent participant during classroom discussions and consistently demonstrated a strong work ethic to come to class fully prepared. Noah's understanding of the material shined through on the final exam, when he earned an A in the course on a difficult exam. Noah's exam answer revealed above-average analytical skills, professional writing, and a marked ability to connect together complex intellectual property concepts. Noah did not appear quite as engaged in my Remedies course, and as a result, did not achieve the grade he wanted. However, I believe that Noah is capable of great work when he applies himself, as evidenced by high marks in several of his law school classes.

This past year, Noah also demonstrated very valuable leadership and organizational skills as a member of the Moot Court Board at UND and Giles Rich IP Moot Court team. As the point person on his IP Moot Court team, in conjunction with his partner, Noah successfully navigated the rules for the competition in order to complete two briefs (one on each side) and to present oral arguments regarding a complicated issue involving patent law, remedies, and civil procedure. Moreover, as a Moot Court Board member, he was tasked with helping to manage various aspects of all the different competitions at the UND. In short, Noah has gained substantial experience in areas that will serve him well as a law clerk in your chambers.

Beyond his skills and capabilities, Noah is delightful to work with. His warm and friendly personality evinces a wonderful person who shows genuine interest in talking with people about the law. Based on my experience serving as law clerk for two federal judges—a U.S. Magistrate judge and U.S. Court of Appeals judge—I know how important it is that each person in chambers

be capable of working as a productive team member. Noah always carries a positive attitude and, no matter the difficulty of the task at hand, he approaches his work with a smile. In my time getting to know Noah in and out of the classroom, he always exhibited a respectful and collegial attitude. Thus, I believe that his positive demeanor and thoughtfulness will serve him well in working for a judge.

Noah has shared with me that he is most interested in practicing intellectual property litigation. Serving as a clerk in the federal judiciary would offer him a tremendous opportunity to start his legal career and learn about litigation in the federal courts. I know that he is very excited about the opportunity. In that regard, if you hire Noah, I expect that you will really enjoy working with him. As such, I offer my recommendation that you consider him for an opportunity to serve as a law clerk in your chambers. Should you have any questions or need anything further from me in support of Noah's application, please do not hesitate to reach out to me.

Sincerely,

Nikola L. Datzov
Assistant Professor of Law
University of North Dakota School of Law

[PLEASE NOTE: I apologize OSCAR will not allow me to upload this letter as a signed PDF on our UND School of Law Letterhead]

April 21, 2022

Recommendation on Behalf of Noah Skavhaug

To Whom It May Concern:

I write in support of Noah Skavhaug's judicial clerkship application. I have had the privilege of teaching Noah throughout his law school venture. I have had him as a student in Constitutional Law I, Professional Foundations, and Legislation. Throughout these classes, I have come to learn more about Noah's amazing personality, hardworking attitude, and motivation for success in his legal passions.

During his 1L spring semester I taught Noah in Constitutional Law I and Professional Foundations. During these classes Noah displayed his dedication to class by frequently participating in class discussions and group work with ease. In Constitutional Law I, my classroom discussion required students to brief cases thoroughly, as well as participate in discussions about the various ideas around the cases. Whenever I called on Noah, he would display that he was well prepared to engage in the law. He would always have his cases briefed thoroughly and would engage in the complex ideas around them. Doing this not only helped him understand the complexities of the law, but also helped other students struggling with the materials. His understanding of the materials paid him dividends in the long run as he received a satisfactory grade (during this semester the school policy was satisfactory/unsatisfactory due to COVID).

Another important attribute Noah possesses is his punctuality. Noah never missed a single class during Constitutional Law and Professional Foundations. His punctuality was especially appreciated once the COVID-19 pandemic occurred requiring all classes to meet over Zoom. Despite this, Noah persevered and showed up to class online with the same eagerness to learn as he did prior to the pandemic.

Noah also was always willing to work together with different groups of students during Professional Foundations. I serve as the course coordinator for Professional Foundations, in which different professors, guest speakers, and panels of legal practitioners showcase different aspects of life as a legal professional. This course helps students cultivate a reflective mindset to bring with them along their journey to becoming a lawyer. As one component of this course, students participate in group discussions that allow them to talk about the various topics at hand. The groups change periodically enabling students to build their communication and adaptability skills with different colleagues. Noah strived here, frequently serving as a leader in the group discussions and volunteering to speak on behalf of his groups.

The most recent class in which I taught Noah was Legislation—a small class consisting of only third-year law students, enabling me to learn about Noah on a more personal level. Here he displayed his interest in human rights and intellectual property. He chose to focus his major research paper on legal issues concerning physician-assisted suicide. This work was thorough, consisting of a detailed overview of the relevant law, ranging from U.S. Supreme Court decisions to various state legislative actions. Specifically, he focused on Washington state's Death with Dignity Act. He then offered an insightful solution incorporating legal and policy reforms, such as changes to the safeguards in previous death with dignity statutes and rescheduling a drug group. In his paper, Noah identified multiple areas of intersecting fields of law, such as constitutional law, human rights law, privacy law, drug administration law, and criminal law.

Moreover, Noah displayed strong interpersonal skills during Legislation. I require students to provide feedback to each other in order for them to learn to give and receive constructive criticism effectively and to strengthen their writing and editing skills. Noah did so with zeal. He provided excellent and unique feedback that helped propel other students forward with their papers. He also took others' feedback on his work and incorporated positive changes into his paper. The ability to give and receive feedback is crucial, which he did effectively. He also displayed these skills in group exercises. I frequently have students discuss different topics during Legislation to build these skills. It was apparent from the outset that Noah was ahead of the curve, being willing to work with anyone and serving as a leader in his groups.

I believe that Noah will make a wonderful addition to your chambers. Noah is well equipped to take on difficult legal issue because of the skills and attributes he has displayed to me throughout his three years at the University of North Dakota School of Law. Noah's personality will allow him to work vigorously, efficiently, and effectively with people from all walks of life and with any issue he that comes in front of him.

Please do not hesitate to contact me if you need any additional information about Noah's outstanding qualifications for a judicial clerkship.

With warmest regards,

Julia L. Ernst

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III. LEGAL PRECEDENT

A. Cruzan v. Director, Missouri Department of Health & Bodily Integrity Cases: A Liberty Right Found in Refusal of Medical Assistance a Bodily Integrity

Cruzan embodies the Court's affirmation that the United States Constitution recognizes the right to refuse life sustaining medical assistance as a fundamental liberty right.[22] Nancy Cruzan, Petitioner, sustained a severe injury in an automobile accident where she was ejected from her car.[23] The accident left her with severe cardiac and respiratory injuries, leaving her with next to no chance of regaining her mental faculties.[24] During her remaining days she was connected to artificial hydration and nutrition, with the removal of either certain death.[25] The Missouri Supreme Court ruled against her parent's request to fulfill the Petitioner's pre-accident request of a discontinuation of life support.[26] The Court affirmed this finding, looking at a history of prior cases involving refusal of unwanted medical treatment.[27] Furthermore, they indicate that this includes the right to die generally.[28] In determining that there is an individual right to self-determination, the Court's inquiry into previous cases led to the consensus that the choice be made while the individual is *competent*, or substituted by clear and convincing evidence of what they would have chosen.[29] However, this limitation is not necessary in any state, a state may opt for a more lenient finding, or alternative finding; the due process clause does not preclude this.[30]

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[22] *Cruzan*, 497 U.S. at 278. The Court retains its sentiment from prior cases that grant an individual liberty right in the right to refuse medical treatment and extends it to the right to refuse life sustaining medical assistance.
[23] *Id*, at 265-6.
[24] *Id*, at 266-7.
[25] *Id*, at 267-8.
[26] *Id*, at 268. The Missouri Supreme Court held that there was a right to refuse treatment but that it would not allow for it here because there was not clear and convincing evidence that Petitioner would have made the same decision as her parent's claimed she would if she were competent.
[27] *Id*, at 286-7.
[28] *Id*, at 277-8. This is not overtly stated, just in reference to the ultimate question of the case: "whether the United States constitution grants what is in common parlance referred to as a "right to die."
[29] *Id*, at 273, 277-8. This choice does not fade when the individual becomes incompetent, it merely must be proven by clear and convincing evidence.
[30] *Id*, at 280.

With regards to suicide generally, the Court remained adamant that the state does have the ability to not be neutral.[31] While this may consider suicide, it does not touch on the main crux of this paper, the right to die by physician assisted suicide. It is different because the person in the Court's hypothetical is not terminally ill or suffering from chronic debilitating pain.[32] This distinction is key for solution 1, an extension of *Cruzan* to physician assisted suicide, to be achieved.

With regards to patient choice, the Court states that a "substituted judgment of close family members" is not necessary or required by the Constitution.[33] Furthermore, the Court states that no one "but the patient [themselves]" has the ability to consent to said procedures.[34] This is another key distinction that solution 1 will touch on that *Glucksberg* and *Quill* overlooked.

The Court inevitably affirmed the Missouri courts' holdings in preventing Nancy Cruzan's parents from substituting their judgment.[35] However, it established that a patient has the right to refuse medical sustaining treatment.[36]

With respects to autonomy, the Court has had a large history with accepting bodily autonomy (contraceptives and abortion) as a fundamental liberty right. The Court in *Casey* noted that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[37] This interest will be furthered on during solution 1; notably, death is as deeply personal to individuals as any other intimate instance in an individual's life.

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[31] *Id*. "We do not think a State is required to remain neutral in the face of an informed and voluntary decision by a physically able adult to starve to death;" in other words, they believe a state may have interest in preventing suicide generally.
[32] *Id*.
[33] *Id*, at 285-6.
[34] *Id*.
[35] *Id*, at 286-7.
[36] *Id*.
[37] *Planned Parenthood v. Casey*, 505 U.S. 883 at 852 (1992). The Court states that the most intimate and personal choices in a person's life is central to dignity and autonomy, a fundamental liberty.

The following section will demonstrate the Court's departure from *Cruzan* and *Casey* by their holdings in *Glucksberg* and *Quill*.

B. Washington v. Glucksberg & Vacco v. Quill: No Right to Physician Assisted Suicide

Glucksberg and *Quill* embody the refusal of the Court to extend the right of bodily dignity to physician assisted suicide, allowing for states to enact laws preventing access to the procedure.[38]

In *Glucksberg*, the state of Washington enacted a law that made it a felony to aid in suicide in any way.[39] The Supreme Court looked into multiple issues in this case including: what is the current and historical consensus of suicide; is suicide a fundamental right; does *Cruzan* embody the right to die by suicide; does *Casey*'s right to bodily autonomy extend to the right to determine one's death ultimately; and can Washington or any state make laws preventing assisted suicide.[40]

The Court notes that in Anglo-American jurisprudence it has been tradition that suicide and assisting with another's suicide be outlawed.[41] The Court notes, however, that the rigid criminalization of suicide generally has been relaxed.[42] However, the prohibition on assisting suicide has never been relaxed.[43] The Court then notes that physician assisted suicide has recently been considered, but ultimately not different from generally assisting suicide.[44] However, they rely on a study that believes that legalizing the right would cause involuntary or coerced physician assisted suicide.[45] This

[38] *Glucksberg*, 521 U.S. at 723; *Quill* 521 U.S. at 808-9. *Glucksberg* rationed through the issue with substantive due process, while *Quill* used equal protection; both coming to the same conclusion.
[39] *Glucksberg*, 521 U.S. at 707. The state considered it "assisting another in the commission of self-murder."
[40] *Id*, at 710-29.
[41] *Id*, at 711. Suicide and assisted suicide has either been punished or disapproved.
[42] *Id*, at 713-4. The American Colonies abolished many criminal penalties, and later different remaining sanctions on the families of the deceased were lifted.
[43] *Id*, at 714-6 ("the prohibitions against assisting suicide never contained exceptions", "[b]y the time the Fourteenth Amendment was ratified, it was a crime in most States to assist a suicide", and "assisted-suicide bans have in recent years been reexamined and, generally, reaffirmed").
[44] *Id*, at 719.
[45] *Id*. The Court here relies on a study by the New York State Task Force on Life and the Law. This study does not take into consideration any safeguards that could be placed that would prevent the involuntary/coerced suicide.

overreach will be discussed in solution 1 further; notably, safeguards are necessary in such laws that provide the right to physician assisted suicide.

In coming to the previous consensus that physician assisted suicide can be banned as assisted suicide is, the Court then turned to the substantive due process liberty analysis. They first distinguish *Cruzan* from the case at hand.[46] They then distinguish from *Casey* and other bodily autonomy cases.[47] The discrepancy in the Court's analysis here about *Casey* will be further discussed in solution 1; notably, they fail to determine why determinations of death wholly are not an intimate and deeply personal point in a person's life.[48] Therefore, the Court holds that the right is not fundamental in the concept of liberty, subjecting the laws prohibiting it to rational basis scrutiny.[49]

The Court then has no trouble in concluding that the Washington law is rationally related to a legitimate governmental interest.[50] However, the Court still leaves open the hastening of death stipulation.[51] Palliative care then is a loophole of sorts that the Court considered but did not rule on here.[52] This will be discussed later in solution 2; notably, it likely is more dangerous to enable than solution 1 with no safeguards because it could be even more coercive.

The Court next, in the same session, heard *Quill*. In *Quill*, the Court evaluated a New York state law that banned assisting in suicide, in tandem with the standards of medical practices that would allow for lethal prescriptions.[53] Unlike in *Glucksberg* where they used substantive due process,[54] the

[46] *Id*, at 725. The Court notes that the right in *Cruzan* was not deduced solely from the concepts of personal autonomy, but a consistency in the long legal traditions in the country.
[47] *Id*, at 726. The Court claims that *Casey* is different that the issue at hand because it dealt with "the most intimate and personal choices a person may make in a lifetime."
[48] *Id*, at 727. The Court notes that even if it was considered synonymous to those rights prescribed in *Casey*, not "all important, intimate, and personal decisions are so protected."
[49] *Id*, at 728. The law must then be rationally related to a legitimate governmental interest, a low bar.
[50] *Id*, at 728, 735-6. The governmental interest of the preservation of life, something the law relates to as it bans assisting in suicide.
[51] *Id*, at 780 (J. Souter, concurring).
[52] *Id*.
[53] *Quill*, 521 U.S. at 796-7.
[54] *Glucksberg*, 521 U.S. at 725.

Court here turned to equal protection.[55] However, the Court reasoned that unlike refusing medical treatment, assisting suicide is not available to anyone let alone everyone.[56]

They further go into their alleged distinction between assisting suicide and withdrawing life support.[57] The Court's first distinguishing factor is causation.[58] This issue in this distinguishing factor will be discussed in solution 1; notably, death is imminent in both situations. The second distinguishing factor is intent.[59] Again, this distinguishing factor will be discussed in solution 1 further. The Court concludes with the sentiment stated previously in *Glucksberg* that the vast majority of states are not in favor of assisting in suicide but are accepting of refusing unwanted medical treatment.[60]

Unlike the brief consideration of palliative care to hasten death in *Glucksberg*,[61] the Court in *Quill* analyzes it, in short, with regards to the intent factor.[62] Moreover, Justice Souter again notes that palliative care should be available where physician assisted suicide does not need to be.[63] This consideration will be discussed further in solution 2.

C. Statutory Provisions of Death with Dignity Acts Throughout America

Although Oregon is the fundamental Death with Dignity statute that the other jurisdictions in America have used as reference, the main focus of this section will the statutory safeguards that are universal in all laws. Those include residency, 18-year patient minimum age, maximum life expectance

[55] *Quill*, 521 U.S. at 798. The respondents urged the Court to consider an extension of *Cruzan*, in that the ability to refuse life-sustaining medical treatment is the same as physician assisted suicide, so the absence of the latter is a violation of equal protections.
[56] *Id*. The Court considers this an evenhanded application, complying with the equal protection clause.
[57] *Id*, at 800-1.
[58] *Id*, at 801. Death is caused by the underlying disease in refusing or withdrawing medical support, while death is caused by the medication in lethal prescription ingestion.
[59] *Id*. The doctor's intent is to honor the patient's wishes when medical aid is futile with respects to refusing or withdrawing medical support, while the doctor's intent is to make the patient "be made dead."
[60] *Id*, at 807. The Court finds solace in prior decisions, and state laws and cases as the consensus.
[61] *Glucksberg*, 521 U.S. at 780 (J. Souter, concurring).
[62] *Quill*, 521 U.S. at 802. The intent is to curb the pain the patient will be in, regardless of the potential hastened death.
[63] *Id*, at 809-10 (J. Souter, concurring).

of 6 months, and intent requests.[64] For brevity, however, Oregon's statute will be the only reference used.

The right to physician assisted suicide in these states come with numerous safeguards to prevent involuntary and coerced suicide. The first safeguard mentioned above is residency. Under Oregon's law, residency requires: (1) in state driver license; (2) registered to vote in state; (3) property ownership or lease; OR (4) tax filing the previous year before request for prescription.[65] This provision is likely enacted to prevent interstate issues that could arise where someone from a non-physician assisted suicide legal state seeks physician assisted suicide in a state where it was passed. This would be an interference in one state's interest in preserving their citizens' life. However, as the statute points out, there are many ways you can prove that you are a "resident" of the state.[66] While this may seem like a non-hurdle, the access issue is still prevalent. It still requires the seeking individual to change residencies to get the procedure done. This inevitably increases the cost of the procedure because not only will they have to change residencies, but they will also have to be in the state on multiple occasions because there are mandatory waiting periods as will be discussed later.[67] This interaction between statutory provisions clearly demonstrates the lack of access to physician assisted suicide to those outside of provider states.

The second safeguard is the minimum age requirement. Under Oregon's law, and all other jurisdictions, the minimum age requirement is 18.[68] Capping, or rather, setting the floor at 18 is likely due to the requirement of an informed decision.[69] Without an informed decision, the patient cannot

[64] See *supra* note 1.
[65] OR. REV. STAT. § 127.860 (1999).
[66] *Id*.
[67] *Id*, § 127.855.
[68] *Id*, § 127.800(1).
[69] *Id*, § 127.800(7).

appreciate, or fully understand the outcomes of their decision.[70] This is similar to *Cruzan*'s holding when it required the patient themselves to choose their destiny.[71]

The third safeguard is the maximum life expectancy. Under Oregon's law, there is a maximum life expectancy of 6 months or less.[72] This provision has been stricken with ridicule as there are many terminal illnesses that are irreversible that last more than 6 months and the time calculations could be miscalculated.[73] While this may not be the most ideal safeguard, the sentiment of only wanting terminally ill patients to receive the medication to inflict death.

The final safeguard is intent requests, or mandatory waiting periods. Under Oregon's law, a patient must initially orally request the medication, then wait 15 days before having the chance to rescind their request.[74] This waiting period also increases the cognizance of the patient to fully understand what the outcome will be. This waiting period is similar to the waiting period in the law considered in *Casey*.[75] However, the 15-day waiting period is much greater than the 1 day waiting period in *Casey*. Moreover, as is important, the waiting period likely still increases cost of physician assisted suicide, a consideration the Court in *Casey* acknowledged.[76]

With these safeguards and previous four cases considered; the following section will look to a solution to the lack of access the rest of the country has with regards to physician assisted suicide.

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[70] *Id*.

[71] See *supra* note 34.

[72] § 127.800(12) ("'Terminal disease' means an incurable and irreversible disease that has been medically confirmed and will . . . produce death within six months").

[73] *Spurious Safeguards*, Disability Rights Education & Defense Fund, https://dredf.org/public-policy/assisted-suicide/spurious-safegaurds/ (last visited Apr. 25, 2021). DREDF argues that this safeguard is spurious, as prognoses are not wholly accurate to time.

[74] § 127.815(1)(h), 850.

[75] *Casey*, 505 U.S. at 885-7. The Court found a 24-hour waiting period does not impose an undue burden on the woman patient in seeking an abortion.

[76] *Id*, at 886 ("[w]e do not doubt that . . . the waiting period has the effect of 'increasing the cost . . . of delay of abortions").

IV. LEGAL SOLUTION

A. Introduction

In this section, two solutions will be considered with regards to the lack of access to physician assisted suicide. In the first, it will be argued that the holdings in *Glucksberg* and *Quill* were arbitrary and capricious with prior legal standards set out by the Court in *Cruzan* and *Casey*. In the second, it will be argued that there still is room for pseudo-physician assisted suicide left open in *Glucksberg* and *Quill*. However, in the comparison section, it will be argued that the 1st solution is superior to the 2nd. Finally, a look at what ideal circumstances should be present for the Court and the States to increase access to physician assisted suicide for the whole of the country.

B. Solution 1 Analysis: An Argument for Extension of Cruzan and Bodily Integrity

What *Cruzan* laid out should be the basis for all right to die cases, including physician assisted suicide. Moreover, *Casey* should be considered as a road map for bodily autonomy and integrity generally. The Court in *Glucksberg* and *Quill* clearly missed the ball when holding that there is no right to choose one's own fate with regards to death when prior cases have clearly hinted otherwise.[77]

Existence does not stop at death, it is carried on in your legacy, how people remember you. The option to die with dignity, to choose not to suffer through irreversible pain, should not be scoffed at. The Court in *Glucksberg* notes that physicians assisted suicide is wholly different from rejecting life sustaining treatment solely because of the legal tradition of banning assisting with suicide.[78] While assisting generally with suicide has always been banned, it is a broad generalization that it should and did extend to physicians assisting dying patients from relieving a patient's pain in the most efficient manner. This traditionalist approach is hampered by the growing consensus in American common

[77] *Casey*, 505 U.S. at 852. Defining one's own concept of existence is at the heart of liberty.
[78] See *supra* note 46.

though that physician assisted suicide should be legal, or a right.[79] While that may a supermajority consensus at the time of *Glucksberg*, it was still the majority consensus, so this proactive approach discredits the common view.[80]

Moreover, the Court in *Glucksberg* discredits a furtherance of *Casey* by stating that in *Casey* the interest by the patient was intimate and personal; however, ranking what life events are more intimate and personal is arbitrary.[81] Nothing is more final than death, so it is potentially even more personal to an individual to choose death than it is to choose an abortion. The Court then argued that even if it was a deeply personal and intimate decision, not all of those decisions should be constitutionally protected.[82]

The Court furthers these sentiments in *Quill* where it looked at specific distinguishing factors.[83] Looking first to causation, the Court arbitrarily states that the cause of death in withdrawing life support is completely different from in physician assisted suicide.[84] While this may be true to some extents, both patients in both cases are terminally ill. They both will die imminently, albeit one is sooner than the other.

Looking second to intent, this is where the Court in *Vacco* wholly disregarded the meaning of *Cruzan* and *Casey*. The distinguishment the Court made *Quill* superimposes the patient's wish onto the doctor in one instance, but not the other.[85] In withdrawing life support, the doctor is said to be honoring the patient's wishes; however, in prescribing lethal medication, the doctor is said to be inflicting death on the patient.[86] However, in both instances the former is true, but the latter is not. In

[79] See *supra* notes 10, 11.
[80] *Id*.
[81] See *supra* note 47
[82] See *supra* note 48.
[83] *Quill*, 521 U.S. at 801. The Court looks to causation and intent.
[84] *Id*.
[85] See *supra* note 59.
[86] *Id*.

both instances, the doctor is hastening the death of the patient, something the patient decided in a competent state.[87] The fear here is that a patient in the second sense could be coerced into suicide or end up there involuntarily.[88] It does not take into consideration safeguards states like Oregon implement to avoid fatal errors.[89]

Finally, patient autonomy, by access to physician assisted suicide as a whole, is the essence of the patient-doctor relationship.[90]

Therefore, *Glucksberg* and *Quill* should be reexamined and overruled because they do not comport with prior jurisprudence and changing societal consensuses.

C. Solution 2 Analysis: An Argument for What Glucksberg and Quill Left Open

Another solution for the lack of access to physician assisted suicide is hastening death medication, also known as palliative care. While this method is used primarily for the improvement of end-of-life symptoms,[91] the Court during *Glucksberg* and *Quill* seems to believe that it could potentially hasten death.[92] However, with the modernization and improvement of many forms of medicine, experts of medicine find that palliative sedation does not hasten death.[93] Therefore, while hastening medication should be available, palliative care currently is not the best solution.

While *Glucksberg* and *Quill* leave open the possibility for palliative care to hasten death, its holdings are antiquated with the modernization of medicine. However, it is the open door currently in American jurisprudence.

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[87] See *supra* note 29. A competent decision must be made by the patient to refuse life supporting treatment.
[88] See *supra* note 45.
[89] See *supra* notes 68, 74.
[90] John Coggon, *Autonomy, Liberty, and Medical Decision-Making*, Camb Law J. (2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3535760/pdf/emss-50952.pdf. While the patient-doctor relationship is not the focus of this argument, it is important to note in passing.
[91] *What is Palliative Care?* American Cancer Society, https://www.cancer.org/treatment/treatments-and-side-effects/palliative-care/what-is-palliative-care.html (last visited Apr 28, 2021).
[92] *Glucksberg*, 521 U.S. at 780 (J. Souter, concurring); *Quill* 521 U.S. at 802.
[93] *Palliative Sedation: Myth v. Fact*, Center to Advance Palliative Care, https://www.capc.org/about/press-media/press-releases/2010-1-6/palliative-sedation-myth-vs-fact/ (last visited Apr. 28, 2021).

D. Solutions 1 is Preferable to Solution 2

As discussed in the previous section, palliative care generally does not hasten death.[94] This creates a wall between states with and without the ability to die by physician assisted suicide. Therefore, the only solution that grants legitimate access to the procedure is solution 1, overturning *Glucksberg* and *Quill*.

E. Ideal Circumstance for a Change

If solution 1 is to be had, there needs to be an issue that arises out of a state where someone wanting to die by physician assisted suicide either gets the prescription from their state where it is banned, or in another state without proper residency. This could bring about a litigation that may bring the question again to the Supreme Court, allowing for a reexamination of the law.

The main obstacle there is that there currently is a 6-3 conservative supermajority. While this is not a political paper, it is a legal one, to get favorable change done politics must be addressed in some rational way. As discussed in the history section, conservatives in general accept physician assisted suicide less than liberals (as well as other bodily autonomy rights).[95] While this may not indicate whether or not the justices of the Supreme Court would agree with the sentiment, it likely does. Moreover, even Justice Breyer, a liberal justice, sided with the majority in both *Glucksberg* and *Quill*.[96] Likely what needs to happen either a large consensus change in American culture to foster the idea as common place in both the liberal and conservative thought, or a change in the makeup of the Court.

V. Conclusion

In conclusion, a reexamination of *Glucksberg* and *Quill* likely needs to occur for there to be proper access to physician assisted suicide for terminally ill patient where death is imminent. While

[94] *Id*.
[95] See *supra* note 9.
[96] *Glucksberg* 521 U.S. at 704; *Quill* 521 U.S. at 794. Breyer concurring with the judgement in both.

this likely will not change anytime soon, it still is a necessary change to ease the pain and suffering of those with imminent death. Physician assisted suicide should be more than a potential right some states allow their citizens to have, it should be a fundamental liberty the same as the right to refuse unwanted medical treatment or abortion.

The German philosopher Friedrich Nietzsche once said, "[t]o die proudly when it is no longer possible to live proudly. Death of one's own free choice, death at the proper time, with a clear head and with joyfulness, consummated in the midst of children and witnesses: so that an actual leave-taking is possible while he who is leaving is still there."[97] To have dignity, one must be able to choose the means of how they die.

[97] Friedrich Nietzsche, *Complete Works*, 98-9 (New York: Russell, 1964).

Applicant Details

First Name	**Andrew**
Last Name	**Slaven**
Citizenship Status	**U. S. Citizen**
Email Address	**andrew.slaven@marquette.edu**
Address	**Address** **Street** **480 W. Karner St.** **City** **Stevens Point** **State/Territory** **Wisconsin** **Zip** **54481** **Country** **United States**
Contact Phone Number	**248-924-5800**

Applicant Education

BA/BS From	**Northern Michigan University**
Date of BA/BS	**December 2017**
JD/LLB From	**Marquette University Law School** **http://law.marquette.edu**
Date of JD/LLB	**May 23, 2021**
Class Rank	**20%**
Law Review/Journal	**Yes**
Journal(s)	**Marquette Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Billings, Exum, and Frye National Moot Court Competition**

Bar Admission

Admission(s)	**Wisconsin**

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Scoville, Ryan
ryan.scoville@marquette.edu
720-933-0197
Hammer, Thomas
thomas.hammer@marquette.edu
414.288.5359

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Andrew Slaven
2422 E. Bradford Ave., Apt. 6, Milwaukee, WI 53211
(248) 924-5800 | andrew.slaven@marquette.edu

August 29, 2020

The Honorable Elizabeth W. Hanes
United States Magistrate Judge
United States District Court for the Eastern District of Virginia
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

As a student at Marquette University Law School, I would be honored to serve as a law clerk in your chambers for the 2021-2023 term. I am interested in litigation and appellate practice and know that a clerkship position in your chambers will have a profound impact on my professional development. As such, I have tailored my schedule to best place myself in a position to be an effective law clerk. For example, I have joined *Marquette Law Review* and Moot Court and have completed Advanced Constitutional Law, Constitutional Criminal Procedure, and am enrolled in Administrative Law. I welcome the opportunity to discuss with you in greater detail my interest in and qualifications for becoming a law clerk in your chambers.

My success in law school and my practical experience create a foundation for me to effectively support you with high-quality research, reasoning, and writing for a high-volume of work. Notable are my academic achievements, including being ranked in the top 20 percent of my class, earning a CALI Award for Civil Procedure, and my membership on the *Marquette Law Review*. My research, reasoning, and writing contributed to my success in reaching Moot Court this fall and will also benefit the work I do in your chambers. I continued to sharpen these skills through my position as a law clerk at the Institute for Justice this summer, where I assisted in research and writing for a number of cases dealing with federal and state legal issues. My experiences also include serving as a judicial intern to Judge Janet Protasiewicz, which sparked my interest in a judicial clerkship, and also an internship at the Federal Defender Services of Wisconsin, where I conducted research and drafted memoranda and briefs for a variety of complex legal matters. Through my studies and practical experiences, I anticipate being prepared to support your chambers as a law clerk.

Included for your consideration is my resume, law school transcript, and a writing sample. You will also see two letters of recommendation from Professors Thomas Hammer (thomas.hammer@marquette.edu) and Ryan Scoville (ryan.scoville@marquette.edu). Thank you for your time.

Sincerely,

/s/ Andrew Slaven

Andrew Slaven

Andrew Slaven
2422 E. Bradford Ave., Apt. 6, Milwaukee, WI 53211
(248) 924-5800 | andrew.slaven@marquette.edu

EDUCATION

Marquette University Law School, Milwaukee, Wisconsin
Candidate for Juris Doctor, May 2021
GPA: 3.414/4.000 Rank: Top 20%
Honors: Thomas More Law Scholarship (3-year renewable merit-based scholarship)
CALI Award (highest grade), Civil Procedure (Spring 2019)
Activities: *Marquette Law Review*, Member
Billings, Exum, and Frye National Moot Court Competition (Fall 2020)
The Federalist Society, Event Coordinator
Criminal Law Society, Member
Marquette Volunteer Legal Clinics, Legal Volunteer (2018-2019)

Northern Michigan University, Marquette, Michigan
Bachelor of Science in Political Science, December 2017
Minor in Environmental Studies
Attended University of Michigan-Dearborn, August 2013-May 2014
Honors: Michigan Competitive Scholarship (renewable merit-based scholarship)
Activities: The North Wind—Independent Student Newspaper, Online Editor
Men's Soccer Team (UM-Dearborn), Member (2013)

EXPERIENCE

The Institute for Justice, Minneapolis, Minnesota
Dave Kennedy Fellow, Summer 2020
Among other projects, researched and wrote memoranda related to cases including FRCP Rule 23 class certification, various state constitutional problems, statutory interpretation, and discovery cases. Cite checked and edited brief for federal court. Conducted a number of fifty-state surveys on different economic policies.

Federal Defender Services of Wisconsin, Inc., Milwaukee, Wisconsin
Legal Intern, Fall 2019
Work included aiding in research, writing, preparing for proceedings, reviewing discovery, and meeting with clients. Assisted in writing briefs in support for Rule 29 Motions, Rule 33 Motion, and motion for reduced sentence under First Step Act.

The Honorable Janet Protasiewicz, Milwaukee County Circuit Court, Milwaukee, Wisconsin
Judicial Intern, Summer 2019
Observed homicide and sexual assault proceedings, including trials and motion hearings. Drafted notes of defendant confession for Judge to use for sentencing.

Office of Public Service, Marquette University Law School, Milwaukee, Wisconsin
Student Assistant, April 2019-Present
Work on projects regarding pro bono legal clinics, including assisting prospective estate planning clients to determine what documents to prepare. Respond to inmate requests for legal assistance.

The Buckeye Institute, Legal Center, Columbus, Ohio
Policy Intern, Summer 2017
Conducted research on Ohio public policy, including informing public about state and national criminal justice legislation. Met with similar organizations in determining the best strategy for reforming cash bail in Ohio.

The Grassroot Institute of Hawaii, Honolulu, Hawaii
Policy Intern, Summer 2016
Conducted public policy research under Vice President of Institute. Wrote articles for Institute on public policy issues within Hawaii and filed Uniform Information Practices Act requests, Hawaii's public records law.

Andrew Slaven
Marquette University Law School
Cumulative GPA: 3.414

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Contracts	Edwards	B	4.0	
Criminal Law	Blinka	A-	3.0	
Legal Analysis, Writing & Research 1	Julien	B+	3.0	
Torts	Bradford	B+	4.0	

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure	Scoville	A	4.0	
Constitutional Law	Oldfather	A-	4.0	
Legal Analysis, Writing & Research 2	Blemberg	B	3.0	
Property	Murray	B	4.0	

Summer 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Criminal Process	Hammer	A-	3.0	
Evidence	Blinka	A-	3.0	
Judicial Internship- Trial: Circuit Court Felony Division	Hammer	S	2.0	

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
American Legal History	Papke	B	3.0	
Seminar: Advanced Constitutional Law	Idleman	A	2.0	
Supervised Fieldwork: Federal Defender Services of WI	Hammer	S	2.0	
The Law Governing Lawyers	Blemberg	A-	3.0	
Workshop: Appellate Writing & Advocacy	Mazzie	B	3.0	

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Constitutional Criminal Procedure	Blinka	H	3.0	

Seminar: Foreign Affairs Constitution	Scoville	H	2.0
Trusts and Estates	Madry	H	3.0
Workshop: Advanced Brief Writing	Henak	P	3.0
Workshop: Trail Advocacy 1	Centinario	P	3.0

Due to COVID-19, all classes this semester that were going to be graded on the traditional A – F scale were instead graded on an Honors/Pass/Not Pass basis.

Fall 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Administrative Law	Murray		3.0	
Business Associations	Grossman		3.0	
Moot Court: Billings Exum & Frye Comp	Blemberg		2.0	
Supervised Fieldwork: WI State Public Defender	Hammer		2.0	
Workshop: Civil Pretrial Practice			3.0	
Workshop: Public Defender	Krause & Reed		1.0	

August 29, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I write to recommend Andrew Slaven for a position as a law clerk in your chambers. I have known Andrew for a year and a half. During this period, he has been a student in two of my courses—a seminar on The Foreign Affairs Constitution and a lecture course on Civil Procedure. Through our interactions, I have learned several things about him.

First, Andrew has an exceptional legal mind. In Civil Procedure, which had roughly sixty students, he earned the single highest score on the final exam and the best overall grade for the course. Even though the exam was timed, Andrew's written analysis was lucid, rigorous, and persuasive. In addition to earning the best score on the final exam, he always came to class exceptionally well prepared, participated in the discussions with enthusiasm, and frequently made incisive comments. Andrew's performance was similarly outstanding in my seminar, where he was one of the most articulate participants in class discussions and demonstrated an ability to debate complicated legal questions in a way that is persuasive but also respectful of dissenting views.

Second, Andrew is an excellent writer. In my seminar, students must write brief papers analyzing the reading material every other week. Andrew's papers consistently exhibited excellent prose that was well-organized, clear, and persuasive. I am confident that he will excel at writing bench memoranda and draft opinions.

Finally, I have learned through interactions outside of the classroom that Andrew is an enjoyable person to be around. He is professional, friendly, and polite. Any judge would be lucky to have him as a clerk.

If you have any questions, please feel free to contact me at ryan.scoville@marquette.edu or (414) 288-6450.

Sincerely,

Ryan M. Scoville
Associate Professor of Law
Marquette University Law School
1215 W. Michigan St.
Milwaukee, WI 53233

MARQUETTE UNIVERSITY
LAW SCHOOL

June 10, 2020

RE: Application of Andrew Slaven for a Clerkship at Your Chambers

Andrew Slaven has applied for a clerkship at your Chambers and he has asked me to furnish a letter of recommendation on his behalf. I am delighted to do so because I believe him to be a very strong candidate for a post-graduate judicial clerkship.

I have gotten to know Andrew well during his time as a law student at Marquette. I have taught him in the classroom where he distinguished himself with an honors grade in my course in criminal procedure. That performance is consistent with the impressive academic record he has compiled to date. Of particular note for a federal clerkship are his successful completion of Marquette's Appellate Writing and Advocacy course and his participation as a competitor in the Law School's intercollegiate moot court program.

I know Andrew best through his participation in Marquette's internship program. I serve as the Director of Clinical Education at the Law School and in that capacity have overseen two internships that Andrew very successfully undertook. During the 2019 summer session he participated in the Judicial Internship: Trial Courts Program with an assignment to serve as an intern for the Honorable Janet Protasiewicz, who at the time was presiding in the Homicide/Sexual Assault courts of Milwaukee County, Wisconsin. Judge Protasiewicz has personally conveyed to me that Andrew was an outstanding intern. In her written assessment of his internship, the Judge rated Andrew as "superior" in all areas of the evaluation. She added a note that Andrew "sparkled in all aspects of this internship."

During the 2019 fall semester Andrew served as an intern at Federal Defender Services of Wisconsin with an assignment in its Milwaukee office. This internship was an intensive research and writing experience. Once again Andrew received "superior" ratings in all areas of his final evaluation. In written comments his internship supervisor wrote that "Andy was enthusiastic, curious and professional. His work was thorough and timely. He did an excellent job for us."

I have personally enjoyed working with Andrew in Marquette's internship program. I always found him to be professional, reliable, diligent and respectful. He is blessed with an engaging personality and I believe that you and your staff would enjoy having him on board at

your Chambers. I have no doubt that he has the credentials to be an excellent law clerk. For these reasons I so strongly recommend Andrew to you.

Thanks for considering these comments. If there is any other way in which I can assist in the evaluation of Andrew's qualifications for the law clerk position at your Chambers, please do not hesitate to contact me. I would be pleased to help in any way necessary. My direct number at the Marquette University Law School is 414-288-5359.

Yours most respectfully,

/s/ Thomas J. Hammer

Thomas J. Hammer
Associate Professor of Law
Director of Clinical Education

Andrew Slaven
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(248) 924-5800 | andrew.slaven@marquette.edu

WRITING SAMPLE

Attached is my writing sample of a reply brief in support of a judgment of conviction. Some sections have been omitted for length including a table of authorities. I researched and wrote this document as an assignment for Advanced Brief Writing this Spring.

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT V

Case No. 15AP222

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Lilly S. Kurtz,

Defendant-Appellant.

On Notice of Appeal to Review a Judgment of Conviction, Entered in the Circuit Court for Clearwater County, the Honorable Mickey Slinger Presiding

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

ANDREW SLAVEN
Assistant District Attorney
State Bar No. XXXXXXX

1215 W Michigan St.
Milwaukee, WI 53233
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Attorney for Plaintiff-Respondent

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Statement of the Issues

An officer may prolong a traffic stop once he has additional reasonable suspicion supported by specific and articulable facts. Officer Knupple, after noticing strong smells coming from the car, the passenger's nervous behavior, and the driver's sniffling, called in a K9 unit to conduct a search that located the defendant's cocaine. Under these circumstances, did Officer Knupple have additional reasonable suspicion to prolong the traffic stop?

The circuit court concluded that Officer Knupple did have additional reasonable suspicion to prolong the traffic stop and denied the motion to suppress the cocaine found.

Position on Oral Argument and Publication

Although the state welcomes the opportunity for oral argument if the court has questions not resolved by the briefs, publication is not likely to be warranted. *See* Wis. Stats. (Rule) 809.23(1)(a).

Statement of Facts

After police officers located cocaine in the defendant's purse, the defendant was arrested and charged with possession of a controlled substance with intent to deliver,

in violation of Wis. Stat. § 961.41(cm)(1g). R1:1. The defense filed a motion to suppress the cocaine found. R5:2. Shortly thereafter, Judge Slinger held a hearing where three officers testified. R13:2.

The circuit court found that Officer Knupple had reasonable suspicion to prolong the traffic stop and denied the motion to suppress. R13:18. The court stated: "Air freshener, college students, concerts, and sniffling at night in a secluded area. It could have meant drugs and obviously did." *Id.* Afterwards, the defendant plead guilty to possession of a controlled substance, in violation of Wis. Stat. § 961.41(3g)(c), and was sentenced to two years of probation. R6:1; R14:11.

Around 9:30 p.m. on the night the police found cocaine, a car pulled into an empty Park and Ride after the buses had stopped running. R13:4. Officer Knupple, who was conducting surveillance on the lot, noticed that the driver was a male who appeared to be in his upper twenties and a female passenger who looked very young and estimated her age somewhere in the mid-teens. *Id.* Officer Knupple also noticed that the license plate tags were expired. R13:5. Suspecting that there might be illegal sexual activity between the older man and young girl, and

because the license plate tag appeared to be expired, Officer Knupple initiated a traffic stop. *Id.* Upon approaching the vehicle, Officer Knupple met the defendant and the driver. *Id.*

Officer Knupple then noticed an air freshener hanging off the vent of the car and a strong smell of cologne coming from the driver. *Id.* The smell was so strong that he "couldn't smell anything except the air freshener and the guy's cologne. He reeked of the stuff." *Id.* Through his training with the police department, Officer Knupple was taught that "marijuana smokers use [air fresheners] to cover up the smell of the smoke in the car," so he began to wonder if the defendant and the driver might be using illegal drugs. *Id.*

The behavior of the defendant and driver indicated to him that "something didn't feel right." R13:6. The defendant was "really giggly" and started flipping her hair. *Id.* The police department taught him that excessive giggling is a sign of nervousness. *Id.* In Officer Knupple's experience, people don't usually get that nervous around him. R13:6.

Also, Officer Knupple noticed that the driver was coughing and sniffling "a lot" and had a tissue out. *Id.*

Drawing from his experiences, Officer Knupple knew that inhaling drugs through the nose causes symptoms including coughing and sniffling. *Id.* At this point in the stop, "something didn't feel right" to Officer Knupple. *Id.*

After identifying the defendant as a nineteen-year-old and the driver as a twenty-year-old, Officer Knupple asked them why they were in the empty Park and Ride so late. *Id.* The driver responded that they had just returned from a concert in Chicago and the defendant added that it had been "on fleek." *Id.*

While checking the vehicle registration, Officer Knupple called a K9 unit due to his suspicions of drug use stemming from the smell of the car, the nervousness of the passenger, and the driver's coughing. R13:7. Approximately twenty minutes later, a "normal" response time based on her location, Officer Carter and the K9 unit arrived. R13:8, 11-12. As they walked around the car, the K9 "alerted" her to the passenger side of the car, meaning the K9 smelled drugs and pawed at the location. R13:12.

Officer Munson, who also works with the K9 unit, arrived on scene and obtained the driver's consent to search the vehicle. R13:14-15. After opening the passenger door, the K9 immediately alerted to the defendant's purse and

Officer Munson acquired her consent to search it. R13:15-16. Officer Munson opened the purse and discovered a bag of cocaine. R13:16.

Argument

I. Officer Knupple had additional reasonable suspicion that gave rise to an objective, articulable suspicion that criminal activity was afoot and therefore he could prolong the traffic stop.

After lawfully stopping the driver and the defendant in an empty parking lot at 9:30 p.m., Officer Knupple noticed strong smells of cologne and an air freshener, that the defendant was acting nervously, and that the driver was sniffling a lot. R13:5-6. Officer Knupple requested a K9 unit that arrived 15 to 20 minutes later—a "normal" response time based on how far away the K9 unit was—and found cocaine in the defendant's purse. R13:9, 12. An officer can prolong a traffic stop to use a K9 search for drugs once he has reasonable suspicion that the individual has violated the law, or is about to violate the law, and the suspicion is supported by specific, articulable facts. *Rodriguez v. United States*, 575 U.S. 348, 355-56 (2015). Given that Officer Knupple had additional reasonable suspicion to prolong the stop, this Court should hold that

the stop was constitutional under the Fourth Amendment and uphold the district court's decision to deny the motion to suppress. This Court should affirm the judgment of conviction.

Appellate courts review constitutional questions of fact using a two-step standard of review. *State v. Post*, 2007 WI 60, ¶ 8, 301 Wis. 2d 1, 733 N.W.2d 634. The circuit court's findings of historical fact are reviewed under a clearly erroneous standard. *State v. Williams*, 2001 WI 21, ¶ 18, 241 Wis.2d 631, 623 N.W.2d 106. The court then independently applies those facts to the constitutional principles. *State v. Wright*, 2019 WI 45, ¶ 22, 386 Wis. 2d 495, 926 N.W.2d 157.

If, during a valid traffic stop, an officer becomes aware of "suspicious factors or additional information that would give rise to an objective, articulable suspicion that criminal activity is afoot, that officer need not terminate the encounter simply because further investigation is beyond the scope of the initial stop." *State v. Malone*, 2004 WI 108, ¶ 24, 274 Wis.2d 540, 683 N.W.2d 1.

To determine this, the Court must look at the totality of the circumstances, where the whole picture must be considered. *United States v. Cortez*, 449 U.S. 411, 417

(1981). It becomes a common-sense question, striking a balance between the members of society to be free from unreasonable intrusions and the interests of that society in solving crime. *State v. Richardson*, 156 Wis.2d 128, 139, 456 N.W.2d 830 (1990). But it is important to keep in mind that "a series of acts, each of them perhaps innocent if viewed separately," may warrant further investigation when taken together under the totality of the circumstances. *United States v. Sokolow*, 490 U.S. 1, 9-10 (1989) (quoting *Terry v. Ohio*, 392 U.S. 1, 22 (1968)).

Here, the defense is not questioning the validity of the traffic stop. R13:2. Both parties agree that Officer Knupple had reasonable suspicion to initiate a traffic stop because the vehicle was missing a registration sticker on the license plate. *Id.* Thus, the only issue is whether Officer Knupple had additional reasonable suspicion to prolong the traffic stop.

A. When considered in the totality of the circumstances, the strong smell of cologne and an air freshener in the car gave Officer Knupple reasonable suspicion.

Courts across the country, including the Wisconsin Supreme Court, have held that the smell of cologne or air fresheners is commonly used to mask the odor of drugs and

can therefore be used when determining reasonable suspicion. *State v. Malone*, 2004 WI 108, ¶ 36, 274 Wis.2d 540, 683 N.W.2d 1 (permitting the inclusion of the smell or presence of air fresheners in the totality of the circumstances test for reasonable suspicion or probable cause); *United States v. Ludwig*, 641 F.3d 1243, 1248 (10th Cir. 2011); *see also United States v. McCoy*, 200 F.3d 582, 584 (8th Cir. 2000); *see also Nathan v. State*, 805 A.2d 1086, 1096 (Md. 2002); *see also State v. Nelson*, 206 A.3d 408 (N.J. 2019); *see also Flood v. State*, 169 P.3d 538, 546 (Wyo. 2007) (holding that the scent of a potential masking agent is one factor that may be considered in a reasonable-suspicion analysis).

Although the defense cites *United States v. Rodriguez-Escalera*, 884 F.3d 661, 670 (7th Cir. 2018), to incorrectly suggest that "a non-excessive presence of air fresheners . . . may show nothing more than a car owner's preference for the smell of air fresheners or the desire to cover up other, lawful odors," Brief of Defendant-Appellant at 11, what the defense does not explain is the full analysis by the court. The court went on to "agree with the government that the presence of air fresheners *should be considered as part of the whole picture . . . .*" *Rodriguez-*

Escalera, 884 F.3d at 670 (emphasis added). In addition, the defense fails to point to any mandatory authority concluding that potential masking smells cannot be used in assessing the totality of the circumstances for reasonable suspicion.

Similarly to Officer Knupple, the officer in *Ludwig* smelled cologne in the car that he pulled over. 641 F.3d 1243, 1246 (10th Cir. 2011). After the officer lawfully stopped a vehicle, the suspect rolled down the window. *Id.* As the window went down, the officer was hit by "[a] strong waft of cologne. . . .something the trooper testified is often used to mask the smell of illegal drugs." *Id.* The court held that, while the use of cologne is perfectly legal, case law acknowledges that it is often "commonly used to mask the smell of drugs" and therefore it can be used to contribute to the reasonable suspicion calculation. *Id.* at 1248.

Just as in *Ludwig*, Officer Knupple smelled a large amount of a potential masking odor. R13:5. What makes the case here even stronger for reasonable suspicion than *Ludwig* is that Officer Knupple smelled *both* cologne and air freshener in the vehicle—not just one or the other. *Id.* The smell was so strong that he "couldn't smell anything except the air freshener and the guy's cologne. He reeked of

the stuff." *Id.* Through Officer Knupple's police department training, he knew that "marijuana smokers use [air fresheners] to cover up the smell of the smoke in the car, so [he] started to wonder if they might be using illegal drugs." *Id.* Based on his training and experience, Officer Knupple, like the officer in *Ludwig*, knew that the smells could be used by someone trying to cover up the odor of drugs. *Id.*

B. When considered in the totality of the circumstances, the defendant's nervous behavior of giggling and flipping her hair gave Officer Knupple reasonable suspicion.

Unusual nervousness is a legitimate factor to consider when evaluating the totality of the circumstances for reasonable suspicion. *State v. Morgan*, 197 Wis.2d 200, 215, 539 N.W.2d 887 (1995); *see also Illinois v. Wardlow*, 528 U.S. 119, 674 (2000). While it is normal for a suspect in a traffic stop to be "somewhat nervous," "fidgeting" behavior of a suspect can be used in determining reasonable suspicion. *State v. Sumner*, 2008 WI 94, ¶ 38 n.18, 312 Wis.2d 292, 752 N.W.2d 783.

Similarly to the defendant in this case, the defendant in *Morgan* "appeared nervous" while failing to produce his operator's license. *Morgan*, 197 Wis.2d at 215. While some nervousness is expected, according to the officer, the

defendant was more nervous than a typical person when stopped by police. *Id.* The Wisconsin Supreme Court held that a reasonably prudent officer could have concluded that the defendant might have been armed. *Id.* In its analysis, the Supreme Court noted that the circuit court discounted the nervousness because it might be explained by the defendant searching for his license. *Id.* at 214. But the Court stated, "We note that another explanation for [the defendant's] nervousness might have been the fact that he was carrying a loaded .22–caliber pistol and drug paraphernalia while speaking to an officer of the law." *Id.* 214-15.

Like the defendant in *Morgan*, the defendant here appeared unusually nervous. R13:6. She was "really giggly" and started flipping her hair. *Id.* Through his experience with the police department, Officer Knupple was taught that excessive giggling is a sign of nervousness. *Id.* Further, like the officer in *Morgan* who said that the defendant was more nervous than a typical person, Officer Knupple stated that in his experience, people don't usually get that nervous around him. R13:6. Lastly, as with the nervous defendant in *Morgan*, the defendant here may have been nervous for a number of reasons. She could have

been nervous because people get nervous when talking to police. Or, relying on the court's view in *Morgan*, she could have been nervous because she had a bag of cocaine in her purse while speaking to an officer of the law.

C. When considered in the totality of the circumstances, the fact that the defendant and driver were in an empty parking lot around 9:30 p.m. gave Officer Knupple reasonable suspicion.

Officers are permitted to consider the relevant characteristics of a location in determining the totality of the circumstances for reasonable suspicion. *Illinois v. Wardlow*, 528 U.S. 119 (2000). Particularly, officers can rely on the fact that it is dark and there are few people around because criminal activity is more likely to occur under those circumstances. *In re Kelsey C.R.*, 2001 WI 54, ¶ 43, 243 Wis.2d 422, 626 N.W.2d 777.

Like the defendant and driver in this case, the defendant in *In re Kelsey C.R.* was hanging out in an isolated area late at night. *Id.* Specifically, the defendant in that case was leaning against a store-front at a time when most stores were closed and there were few people around. *Id.* On these facts alone, the Wisconsin Supreme Court held that an officer would have reasonable suspicion to believe

that the defendant had committed, was committing, or was about to commit a crime because "[c]riminal activity is more likely under such conditions." *Id.*

Here, the defendant and driver pulled into the park and ride at 9:30 p.m., well after the sunset. R13:4, 5. Just like in *In re Kelsey C.R.*, it was dark and no one was around—a time when criminal activity is more likely to occur. According to Officer Knupple, their presence in the Park and Ride was very unusual because none of the Park and Ride buses ran that late and because the lot was completely empty. R13:4.

D. When considered in the totality of the circumstances, the driver's sniffling gave Officer Knupple reasonable suspicion.

One prominent and common symptom of cocaine use is a runny nose or frequent sniffles. *Cocaine Symptoms and Warning Signs*, Addiction Center, https://www.addictionce nter.com/drugs/cocaine/symptoms-signs/. In fact, sniffling or nose rubbing is even a helpful symptom "in detecting warning signals of cocaine abuse . . . ." in lawyers. Ronald E. Mallen, *Legal Malpractice* § 2:129 (2020 ed.).

Similarly to Officer Knupple, the officer in *Rangitsch* relied on her training, experience, and observations of drug

symptoms to establish probable cause. *State v. Rangitsch*, 700 P.2d 382, 386 (Wash. Ct. App. 1985). In that case, the officer observed the defendant shaking, mumbling, and sniffling as well as other symptoms such as mood swings and agitation. *Id.* at 384. Based on her training in recognition of drug use symptoms, she "believed that he was under the influence of drugs." *Id.* The court held that her testimony concerning her training, experience, and observations "supports the finding and conclusion that there was probable cause to believe the defendant was under the influence of drugs . . . ." *Id.* at 386.

Here, like the officer in *Rangitsch*, Officer Knupple also relied on his training and experience regarding symptoms of drug use. R13:6. Particularly, his training and experience taught him to know that inhaling drugs through the nose causes symptoms including sniffling. *Id.* While the sniffling could have been a cold as the defense points out, Brief of Defendant-Appellant at 13, Officer Knupple also knew that it could have been drug use. When taken in the totality of the circumstances, this gives rise to reasonable suspicion.

Conclusion

Under the totality of the circumstances, Officer Knupple had reasonable suspicion to prolong the traffic stop based on the smell of the car; the nervousness of the defendant; the fact that the driver and defendant were in an empty parking lot at 9:30 p.m.; and the sniffling of the driver.

For the reasons stated, the Court should affirm the judgment of conviction.

Dated this 2nd day of May, 2020.

/s/ Andrew Slaven
ANDREW SLAVEN
Assistant District Attorney
State Bar No. XXXXXXX

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Attorney for Plaintiff-Respondent

Applicant Details

First Name	**Justin**
Middle Initial	**R**
Last Name	**Snyder**
Citizenship Status	**U. S. Citizen**
Email Address	**jurysnyd@gmail.com**
Address	**Address** Street **2035 Friar Tuck Circle** City **Adrian** State/Territory **Michigan** Zip **49221** Country **United States**
Contact Phone Number	**7346356934**

Applicant Education

BA/BS From	**Eastern Michigan University**
Date of BA/BS	**December 2017**
JD/LLB From	**Indiana University Maurer School of Law** **http://www.law.indiana.edu**
Date of JD/LLB	**May 6, 2021**
Class Rank	**20%**
Law Review/Journal	**Yes**
Journal(s)	**Indiana Law Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	

Bar Admission

Admission(s)	**Indiana**

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Madeira, Jody
jmadeira@indiana.edu
812-856-1082
Krishnan, Jayanth
jkrishna@indiana.edu
812-856-0434

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Justin Snyder

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August 21, 2020

The Honorable Elizabeth W. Hanes
United States District Court for the Eastern District of Virginia
Spottswood W. Robinson III & Robert R. Merhige, Jr. United States Courthouse
701 East Broad Street, 5th Floor
Richmond, Virginia 23219

Dear Judge Hanes,

I am writing to apply for a judicial clerkship in your chambers for the 2021–2023 term. I am a third-year student at Indiana University Maurer School of Law – Bloomington. I am interested in serving as a clerk in your chambers because of your reputation and dedication to service. I am confident that my personal and academic experiences will allow me to positively contribute to your chambers.

As a first-generation college student, I initially had no aspiration to venture into higher education, let alone to become a lawyer. Writing was one of the few areas that I applied myself during high school, and my English teacher took notice. She nominated me as one of two students to attend a "mock government" summer program called Boy's State. In this program, I received my first real exposure to the law, and I saw its potential to change the lives of those around me. From that point forward, I made continual efforts to apply myself academically in the pursuit of becoming a lawyer, even though my college years brought their own challenges to this journey. While in school, I worked up to three jobs at any given time out of my necessity to afford college, alongside various other outside commitments.

In addition to balancing work with academics, I have consistently developed my sense for community, teamwork, and leadership. At age fourteen, I began volunteering at a local health clinic in my hometown of Ypsilanti, Michigan. Since then, I have continued to volunteer in different organizations to help those in need. These experiences varied from raising money for victims of domestic abuse, to serving as a disc jockey for a twenty-four-hour Relay for Life cancer research fundraiser. Through these efforts, I strive to bring together peoples of diverse backgrounds to initiate positive change. As an example, during the 2017 hurricane season, I brought together hundreds of people for a charity block party to raise thousands of dollars for disaster relief. Moments like these have shaped who I want to become in the legal profession. I aspire to be a lawyer who can work with others effectively to help those in need and, ultimately, promote the greater good. These experiences created a strong work ethic within me that I have continued to apply to my studies.

I have consistently developed and honed my writing style throughout the years. I am a member of the *Indiana Law Journal*, where I will serve as one of the *Journal*'s Managing Editors during my third year. I have written several memorandums for the Honorable Debra McVicker Lynch that her staff have commended and given feedback on to help me grow as a writer. I have excelled in several moot court competitions, both in undergraduate and law school, that have allowed me to progressively improve my writing over time. Through these experiences, I have learned to grow and thrive from feedback.

Thank you for considering my application. I am confident that I will be a stellar communicator, an effective listener, and an invaluable resource to your chambers. I look forward to hearing from you.

Sincerely,

Justin Snyder

404 South Fess Avenue, Bloomington, Indiana 47401
(734) 635-6934
jurysnyd@iu.edu

Justin Snyder

EDUCATION

Indiana University Maurer School of Law, Bloomington, Indiana May 2021
Juris Doctor Candidate (GPA: 3.567; Top 25%)

- *Indiana Law Journal*: Managing Editor (2020–2021), Associate (2019–2020)
- Moot Court Board: Executive Problem Coordinator (2020–2021)
- Global Antitrust Institute Invitational Moot Court Competition (2021)
- Kaufman Memorial Securities Law Moot Court Competition (2020)
- Sherman Minton Moot Court Competition: Brief Writing & Oral Advocacy Honors (2019)
- Practice Group Advisor: selected as a mentor to first-year law students (2019–2021)
- Business & Law Society: Treasurer (2019–2020)
- Outreach for Legal Literacy: taught local fifth graders legal concepts and rules (2018–2019)
- District 10 Pro Bono Project: referred low-income clients to local legal aid agencies (2018–2019)

Eastern Michigan University, Ypsilanti, Michigan December 2017
Bachelor of Business Administration, Finance; magna cum laude (GPA: 3.73; University Honors)

- Minor in Political Science
- American Moot Court Association Midwest Regional Competition: Top 16 Team
- Tau Kappa Epsilon: President
- Resident Advisor

LEGAL EXPERIENCE

Federal Habeas Clinic, Bloomington, Indiana August 2020 – Present
Clinic Intern

- Litigate federal habeas cases within the Seventh Circuit alongside practitioners

Indiana University Kelley School of Business, Bloomington, Indiana June 2020 – Present
Research Assistant, Matthew Turk & Jennifer M. Pacella

- Research and edit drafts of legal scholarship scheduled for publication

May Oberfell Lorber, Mishawaka, Indiana July 2020 – August 2020
Summer Associate

- Wrote memorandums and briefs for attorneys, prepared for trials, and analyzed contracts

U.S. District Court for the Southern District of Indiana, Indianapolis, Indiana January 2020 – April 2020
Judicial Intern, The Honorable Debra McVicker Lynch

- Drafted legal memorandums for discovery motions to compel and summary judgment motions

Auto-Owners Insurance, Lansing, Michigan June 2019 – August 2019
Legal Operations Intern

- Analyzed legal corporate matters and presented compliance suggestions to various departments

ADDITIONAL EXPERIENCE

Red Lobster, Ann Arbor, Michigan January 2015 – July 2018
Server

- Served customers and trained new staff to be productive members of restaurant team

U.S. House of Representatives, Washington, District of Columbia July 2017 – August 2017
Legislative Intern, Office of Representative Dave Trott

- Researched issues to aid U.S. House Committee on Financial Services legislative assistants

VOLUNTEER EXPERIENCE

St. Jude Children's Research Hospital ($20,000+ raised; 100+ hours worked)
Relay for Life ($15,000+ raised; 70+ hours worked)

INTERESTS

Amateur Magician; Novice Musician; Traveling; Fishing

Justin Snyder
Indiana University Maurer School of Law
Cumulative GPA: 3.567

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure	Samuel	P	4	
Contracts	Mattioli	A-	4	
Legal Profession I	Parrish	S	1	
Legal Research & Writing I	Downey	B+	2	
Torts	Madeira	A	4	

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Constitutional Law I	Johnsen	B+	4	
Criminal Law	Scott	A-	3	
Legal Profession II	Henderson	B+	3	
Legal Research & Writing II	Downey	A-	2	
Property	Krishnan	A-	4	

Summer 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Modern Law Practice I	Henderson	S	3	

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Corporations	Foohey	B+	3	
Indiana Law Journal	Johnsen	S	1	
International Business Transactions	Emmert	A-	3	
Intro to Income Tax	Lederman	B+	4	
Seminar in Comparative Inequalities	Brown	A-	3	

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Advocacy: External Teams	Lahn	S	1	
Evidence	Eaglin	S	3	
Indiana Law Journal	Johnsen	S	1	
Judicial Field Placement	Van der Cruysse	S	3	
Lawyer as a Business Executive	Henderson	S	1	

Seminar in Judicial Conduct	Geyh	S	3
Wills & Trusts	Gjerdingen	S	3

This semester was subject to a satisfactory/fail system due to complications resulting from COVID-19.

Grading System Description

Grade and credit points are assigned as follows: A+ or A = 4.0; A- = 3.7; B+ = 3.3; B = 3.0; B- = 2.7; C+ = 2.3; C = 2.0; C- = 1.7; D = 1.0; F = 0. A "C-" grade in our grading scheme reflects a failing grade and no credit. An "F" is reserved for instances of academic misconduct. At graduation, honors designation is as follows: Summa Cum Laude - top 1%; Magna Cum Laude - top 10%; Cum Laude - top 30%. For Dean Honors each semester (top 30% of class for that semester) and overall Honors determination, grades are not rounded to the nearest hundredths as they are on this record. Marked (*) grades are Highest Grade in class. Since this law school converts passing grades ("C" or higher) in courses approved from another college or department into a "P" (pass grade), for which no credit points are assigned, there may be a slight discrepancy between the G.P.A. on this law school record and the G.P.A. on the University transcript. Official transcripts may be obtained for a fee from the Indiana University Registrar at the request of the student .

August 21, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

It a pleasure to write in support of Justin Snyder's clerkship application. I believe Justin's resume and transcript speak for themselves and will direct my remarks to his academic capabilities and character.

I first became acquainted with Justin when he was a student in my large first-year torts class in Fall of 2018, where he received an A. Justin's class performance and contributions were superb. Justin had an innate sense of what key issues were in cases and did an excellent job of tying important concepts together earlier in the semester. He was always well-prepared for class, and was an attentive and supportive classmate. Torts is an area of law where holdings are contradictory, and where there are myriad questions but few answers. But Justin regarded that ambiguity as a creative opportunity, not as an obstacle. He is the quintessential teachable student, knowing when to listen and when to ask questions. As I got to know him outside of class through office visits and other interactions, it was apparent that Justin had a ready intellect, solid work ethic, and friendly personality. I found his final torts exam extremely impressive, and he came close to getting the top grade in the course.

Over the last two years, I have gotten to know Justin even better, and have grown more impressed. His involvement in activities is extraordinary, as has his energy. At times in the year when other law students may seem to overworked or anxious about job possibilities, Justin's passions for learning, helping others, and engagement in law school life is infectious. There is no question that he is a respected leader and colleague to his classmates. He is one of those people who can be counted on to make one's day better. This has been one of his personal talents for a long time; his resume attests to his public service and volunteer accomplishments. Justin is one of those fantastic students who goes into law for the very best of reasons: to help others.

Justin and I have discussed his desire to clerk at length. He has been curious about clerking since his first year, and his desire to clerk has been fueled after learning (from other professors and practicing attorneys) about the transformative impact that a clerkship has on legal knowledge, personal growth, and career trajectory. Justin knows that seeing behind the scenes of courtroom goings-on, witnessing judicial decision making in action, and personally participating in that decision making will make him a better person and a better lawyer. He is especially excited about the mentoring that is often at the heart of the clerking relationship.

For these reasons, I highly recommend Justin to you as a clerkship candidate. It has been a sincere pleasure to have him as a student, and to become personally acquainted with him. I have witnessed firsthand his work ethic, intellectual aptitude, and passion for legal research and practice. Should you have any questions or need additional information, please do not hesitate to contact me at jmadeira@indiana.edu or 717-580-0784 (cell).

Yours Sincerely,

Dr. Jody Lyneé Madeira
Professor of Law & Louis F. Neizer Faculty Fellow
Co-Director, Center for Law, Society & Culture
Indiana University Maurer School of Law
jmadeira@indiana.edu | 812-856-1082

August 21, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

Mr. Justin Snyder has asked me to write a letter of recommendation on his behalf; I am delighted to do so.

Justin was a student in my Property Law course during the spring 2019 semester. In class, he was, in a word, terrific. He scored a very high grade, was always prepared throughout the semester, and came to every session of our course with astute questions and pointed insights. His analytical skills, combined with his talented writing as shown by his exam, exemplified his keen intellect.

Over the past year, I have had the good fortune to become more acquainted with Justin and his professional background. I know, for example, that he is an associate member on the prestigious *Indiana Law Journal*. In addition, he received an "honors" score for his participation in the 2019 Sherman Minton Moot Court Competition. He also is an advisor and mentor to first-year law students, and he was selected to participate in an elite legal professions program hosted by the Institute for the Future of Law Practice.

Justin's successes as a student trace back well before law school. At Eastern Michigan University, where he earned his B.B.A., Justin was a star. At EMU, he majored in finance and minored in political science, and he received several academic awards and honors during his time there.

Professionally, because of his important past experience, I have no doubt that Justin will be a perfect fit for this position as a judicial clerk. Last year, Justin worked as a legal intern for Auto-Owners Insurance, where he did a number of important legal research and writing tasks. This semester, he is clerking as an extern for the Honorable Debra McVicker Lynch of the U.S. District Court for the Southern District of Indiana. And Justin is committed to public service. He has worked as a pro bono intern where he has helped low-income individuals with their legal needs. And he volunteers for a local legal literacy initiative here in Bloomington.

As you can see, the reason I think that Justin would be ideal for this position is because, as his CV indicates, he is a well-rounded person who is committed to the public good. He is a fantastic writer, an extremely gifted person, and wonderful human being. He will make you proud, I am sure.

Therefore, without reservation, I highly recommend Justin Snyder for this position, and I do hope you will seriously consider his application.

With warmest wishes,

Jayanth K. Krishnan
Milt and Judi Stewart Professor of Law
Director, Milt and Judi Stewart Center on the Global Legal Profession
Indiana University Maurer School of Law

Jayanth Krishnan - jkrishna@indiana.edu - 812-856-0434

Justin Snyder

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WRITING SAMPLE

The attached writing sample is a portion of a legal brief I wrote for the 2020 Kaufman Memorial Securities Law Moot Court Competition. The brief addresses why Respondent, an Italian liquor company, is liable under Rule 10b-5 of U.S. securities law. Respondent's company had unsponsored American Depository Receipts traded within the United States. Afterwards, Respondent distributed false regulatory information that eventually led investors, including Americans, to suffer steep financial losses.

The writing sample includes: (1) the statement of facts; (2) the statement of the case; and (3) an argument on why Rule 10b-5 applies to a domestic American Depository Receipt exchange, even though the Respondent's company is foreign. The original brief included an additional section arguing that the Respondent was a disseminator of the misleading statements, which has been omitted because it was my partner's work. The summary of the argument and standard of review sections have also been omitted for length considerations.

Although benefitting from general comments from my competition partner, the writing sample represents my own original work.

STATEMENT OF FACTS

In 2017, Robert Maxelrod, manager of Connecticut-based hedge fund Maxe Capital, sought a promising new investment. (R. at 1.) That same year, at its 2017 Annual Shareholder Meeting, Italian liquor company, Alcollezione, revealed its new hard seltzer product: Frizzantissimo. (R. at 6.) Projections for Alcollezione appeared promising, just before the company's stock price tanked from the product's noncompliance with applicable law. (R. at 6.) Alcollezione knew about the likelihood of noncompliance in advance yet failed to tell the public until it was too late. (R. at 5.) That conduct led to roughly a $6.1 million loss amongst Maxe Capital and other investors. (R. at 7.)

Alcollezione was founded in 2009 by New York businessmen Gianni Marconi and Benny Factor. (R. at 1-2.) Marconi was to be the Chief Executive Officer and Factor was to be the Chief Financial Officer of the company. (R. at 3.) Ava Cato, a recent Italian law school graduate, was hired to serve as the company's General Counsel. (R. at 2.) Cato incorporated Alcollezione and established the company's headquarters in Milan, Italy. (R. at 2.) Being a new company, Alcollezione needed to raise substantial capital. (R. at 2.)

In 2011, Alcollezione issued an initial public offering (IPO) for twenty million shares of common stock on the Italian stock exchange. (R. at 3.) Using the newfound cash from the IPO, Alcollezione expanded its business into the United States. (R. at 3.)

Alcollezione's drinks quickly became popular among American young adults. (R. at 3.) The business's executives visited the United States during this growth period. (R. at 3.) During one of these visits, an investment banker and friend of Factor's, Doris Schutt (R. at 4), suggested that Alcollezione form a U.S. subsidiary and sponsor an American Depository Receipt (ADR) (R. at 3). Marconi declined the offers because of his grown tire for U.S. business. (R. at 3.)

However, later when asked why he maintained his U.S. citizenship in Italy, Marconi said, "I feel the way I do now, but you never know what tomorrow holds." (R. at 4.)

Schutt told Marconi that she wanted to set up an unsponsored ADR for Alcollezione through her position at her bank because trading on foreign exchanges was restricted in American investor portfolios. (R. at 4.) Marconi replied, "[A]ny friend of Factor's is a friend of mine." (R. at 4.) Afterwards, Schutt registered the unsponsored Alcollezione ADRs with the United States Securities and Exchange Commission (SEC). (R. at 4.) The ADRs then traded over the counter (OTC) to numerous hedge fund managers throughout New York and Connecticut. (R. at 4.)

In 2017, Alcollezione held its Annual Shareholders Meeting where it was set to announce its hard seltzer product: Frizzantissimo. (R. at 5.) Alcollezione provided pro forma financial statements and samples of the product to attendees. (R. at 6.) Both the presentation and the pro forma financial statements included representations drafted by Cato stating that Frizzantissimo would be approved and ready for market in the second quarter of 2018. (R. at 6.) All this information, including Cato's regulatory assurances, was posted to the "Investor Relations" page of Alcollezione's website. (R. at 6.)

The investors were impressed by what Alcollezione presented, causing the stock and ADR price to surge over eight percent following market close that day. (R. at 6.) The inflated prices persisted into early 2018, driven mostly by American hedge fund investors (R. at 6) like Maxelrod's Maxe Capital (R. at 1).

On March 14, 2018, however, Alcollezione's stock and ADR price plummeted by twenty-nine percent and twenty-seven percent respectively. (R. at 6.) The crash stemmed from Alcollezione halting their Frizzantissimo production due to noncompliance with quality-control

standards. (R. at 6.) The public was unaware of the risk of noncompliance at the time, but Alcollezione knew about the risk far before the Frizzantissimo announcement. (R. at 5.)

Alcollezione wanted to follow the trend of hard seltzer waters by developing Frizzantissimo. (R. at 5.) After researching the legal regulations applying to hard seltzer, Cato found that compliance with the regulations "seemed unlikely in the short term" and ultimately "would be an uphill climb." (R. at 5.) Marconi did not care. (R. at 5.) Faced with a foundering stock price (R. at 5) and fueled by the company's mission to become the market leader (R. at 1-3, 5), Marconi insisted that Alcollezione continue with the release of Frizzantissimo regardless of potential noncompliance (R. at 5). Marconi said he would just "ask for forgiveness" if the company received any blowback. (R. at 5.) Cato then drafted the false and misleading regulatory assurances, which were inserted in the investor materials at the 2017 annual meeting and posted online. (R. at 6.) These "assurances" led various American hedge funds to invest in Alcollezione (R. at 6) and ultimately lose millions of dollars from Frizzantissimo's noncompliance with regulations (R. at 7).

STATEMENT OF THE CASE

On September 6, 2018, Robert Maxelrod, filed suit on behalf of all purchasers of Alcollezione ADRs between the 2017 Annual Meeting and March 14, 2018 (collectively, the "Petitioners"), against Alcollezione and its former executives: Ava Cato (the "Respondent"), Gianni Marconi, and Benny Factor, in the United States District Court for the District of Fordham. (R. at 7.) Petitioners' complaint alleged that Alcollezione and its former executives issued false assurances that amounted to securities fraud in violation of Section 10(b) of the Securities Act of 1934 and Rule 10b-5. (R. at 7.) Later in September 2018, the Petitioners settled

their claim with Alcollezione for an undisclosed amount, leaving only the claims against the former executives. (R. at 7.)

On October 17, 2018, the remaining executives each filed separate Rule 12(b)(6) motions to dismiss the case. (R. at 7.) The District Court rejected the motion in part on November 21, 2018, by (1) finding that the executives were sufficiently involved in a domestic transaction, (2) granting Factor's motion to dismiss because Petitioners failed to plead sufficient facts against the executives that would give rise to a strong inference of scienter, and (3) holding that Respondent was subject to primary liability for the misleading statements under 10b-5(a) and (c). (R. at 8.) Respondent sought interlocutory appeal for issues (1) and (3) above, pursuant to 28 U.S.C. § 1292(b). (R. at 8.) The United States Court of Appeals for the Fourteenth Circuit reversed the decision of the District Court on both appealed issues. (R at 23.) Petitioners thereafter filed petition for certiorari to the United States Supreme Court and were granted certiorari on February 3, 2020. (R. at 34.)

STANDARD OF REVIEW

[This section is omitted].

SUMMARY OF THE ARGUMENT

[This section is omitted].

ARGUMENT

I. SECTION 10(B) AND RULE 10B-5 APPLY TO PETITIONER'S CLAIM BECAUSE THE ALCOLLEZIONE ADR TRANSACTION OCCURED IN AMERICA.

The Fourteenth Circuit erred by failing to apply SEC Rule 10b-5 to Petitioner's claim. Under Rule 10b-5, a court need only determine whether a transaction is foreign or domestic. By subjecting all securities transactions that take place in the United States to Rule 10b-5, the lower

court would have complied with this Court's intentions of creating a clear, and easy to apply standard across cases. However, even if this Court determines that a transaction being domestic is not sufficient—but must also not be predominantly foreign—the Respondent's consistent and knowledgeable conduct in the United States should nonetheless subject Petitioners' claim to Rule 10b-5.

A. Rule 10b-5 applies to Petitioner's claim because the Alcollezione ADR transaction occurring domestically is sufficient.

Section 10(b) of the Securities Act of 1934 provides that:

> It shall be unlawful for any person . . . [t]o use or employ, *in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered*, . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe.

15 U.S.C. § 78j(b) (2012) (emphasis added). Unless otherwise indicated in a statute's language, U.S. laws naturally have a presumption against extraterritoriality, meaning that "'unless there is the affirmative intention of the Congress clearly expressed' to give a statute extraterritorial effect, 'we must presume it is primarily concerned with domestic conditions.'" *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)).

Morrison held that Section 10(b), and Rule 10b-5 promulgated thereunder, did not rebut this presumption, and that Rule 10b-5 applied to "domestic" transactions. *Id.* at 265. The Court then expressed that claims are subject to Rule 10b-5 if a foreign company's security is either: (a) listed on a domestic exchange or (b) part of a "domestic transaction[] in other securities." *Id.* at 267. OTC transactions, such as those in this case, are analyzed by courts under the "transaction" prong. *See, e.g.*, *United States v. Georgiou*, 777 F.3d 125, 135 (3d Cir. 2015). Courts have generally agreed that a claim satisfies this prong, and is therefore subject to Rule 10b-5, if

"irrevocable liability is incurred or title passes within the United States." *Absolute Activist Value Master Fund Ltd. v. Ficceto*, 677 F.3d 60, 67 (2d Cir. 2012); *accord SEC v. World Capital Mkt., Inc.*, 864 F.3d 996, 1008 (9th Cir. 2017); *Georgiou*, 777 F.3d 136.

1. *Morrison*'s plain language states that Section 10(b) applies to all claims arising out of securities transactions occurring within the United States.

"[T]he focus of the Exchange Act is . . . upon purchases and sales of securities in the United States." *Morrison*, 561 U.S. at 266. When discussing issues of extraterritoriality under federal statutes, the Supreme Court has held that "[i]f the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application *even if other conduct occurred abroad*." *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016) (emphasis added); *see also* Restatement (Fourth) of Foreign Relations Law § 404 cmt. c (Am. Law. Inst. 2018) ("If whatever is the focus of the provision occurred in the United States, then application of the provision is considered domestic and is permitted.").

Therefore, the only explicit requirements *Morrison* presents for a claim to be subject to Rule 10b-5 is that (1) there be purchase or sale of a security and (2) the purchase or sale occurs within the United States. Because the transactions took place within the United States, in both Connecticut and New York (R. at 4), the second element is satisfied. Therefore, based on the plain language of *Morrison*, the court must only determine whether there was a purchase or sale of a security.

ADRs are securities subject to the Rule 10b-5. ADRs are meant to represent an interest in common stock for foreign companies. *See* Sec. & Exch. Comm'n, *Investor Bulletin: American Depository Receipts* 1 (2012), https://www.sec.gov/investor/alerts/adr-bulletin.pdf.
An ADR effectively serves as an extension of the underlying stock and has many of the same characteristics to common stock as a result. *See Stoyas v. Toshiba Corp.*, 896 F.3d 933, 939-40

(9th Cir. 2018) (describing several similarities between ADRs and stock, including "dividends," "negotiability," the "ability to be pledged," "voting rights," and the "ability to appreciate"). ADRs have also already have been treated as securities for purposes of Rule 10b-5 claims throughout courts. *E.g., id.*

The Petitioners' claim is subject to Rule 10b-5 because the Alcollezione ADR is a security and the transfer occurred within the United States. *Morrison* does not make any disclaimer on which securities it covers, and the Alcollezione ADR functionally serves as a stock. Much like standard ADRs, the Alcollezione ADR has tracked the rises and falls of the company's actual stock virtually verbatim. (R. at 6.) This economic reality, alongside courts general treatments of ADRs akin to stock, necessitate the ADR's treatment as a security for Rule 10b-5 purposes here.

Since the Petitioners' ADRs are securities that were traded in the United States, the Petitioner's claim is permissible to bring against Respondent under the plain language of *Morrison*.

2. Even if this court goes beyond a plain text reading of *Morrison,* that case's intent was to create a clear and administrable rule, and thus no additional analysis is required.

Morrison made clear that the Court desired to create a "clear test" for Rule 10b-5 that led to uniform applications and predictable results. 561 U.S. at 269. In the years leading up to *Morrison,* lower courts struggled in determining the extraterritorial reach of the Exchange Act, which resulted in inconsistent applications of Rule 10b-5. *See* Kun Young Chang, *Multinational Enforcement of U.S. Securities Laws: The Need for the Clear and Restrained Scope of Extraterritorial Subject-Matter Jurisdiction*, 9 Fordham J. Corp. & Fin. L. 89, 108-09 (2003) ("[E]ach court . . . expand[ed] or limit[ed] its jurisdictional coverage according to its individual

whims . . . . This lack of clear guidance has resulted . . . in inconsistent standards."). *Morrison* sought to remedy the lower courts' concerns by looking only to "whether the purchase or sale is made in the United States." 561 U.S. at 269-70.

The Ninth Circuit translated *Morrison*'s concerns into their application of Rule 10b-5 to "*domestic* purchases and sales" of securities, regardless of outside conduct. *Stoyas*, 896 F.3d at 947-48 (quoting *Morrison*, 561 U.S. at 268). This would lead to an easy application of Rule 10b-5 by requiring a court to look only whether a transaction occurred domestically or outside the United States.

On the other hand, the Second Circuit instead held the transaction test was "necessary but not necessarily sufficient to make § 10(b) applicable." *Parkcentral Glob. Hub Ltd. v. Porsche Auto. Holdings SE*, 763 F.3d 198, 216 (2d Cir. 2014). In *Parkcentral*, the Second Circuit set out a two-step approach that requires a transaction to (1) be domestic and (2) not be "predominately foreign." *Id.* Unlike the Ninth Circuit's bright-line rule, the Second Circuit's predominantly foreign determination looks to various foreign factors surrounding the transaction. *See id.* at 215-16.

Pre-*Morrison*, the Second Circuit repeatedly used similar "conduct" and "effects" tests to determine whether Rule 10b-5 should apply. *E.g.*, *Itoba Ltd. v. LEP Grp. PLC*, 54 F.3d 118, 121-22 (2d Cir. 1995), *abrogated by Morrison*, 561 U.S. 247. "[T]hese [Second Circuit] tests were not easy to administer." *Morrison*, 561 U.S. at 258. Contradicting *Morrison*, the Second Circuit now continues to apply a similar test as taxing as the one before. *See Parkcentral*, 763 F.3d at 217. The Second Circuit justified continuing their factors analysis by citing the Court's statement that "the presumption . . . would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." *Parkcentral*, 763 F.3d at 210 (quoting

Morrison, 561 U.S. at 266). However, the Second Circuit has admitted that *Parkcentral*'s predominately foreign step ultimately lacks support.

The Second Circuit's predominately foreign examination pushes against *Morrison*'s binding authority. The Second Circuit has said that they are unable to find language in the Securities Act of 1933 that suggests a factor inquisition for Rule 10b-5's application for extraterritoriality. *Bersh v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir. 1975). *Morrison* criticized the inconsistency of the previous Second Circuit factors tests such as this one, pointing to the Circuit's admission that a significant factor in one case "is not necessarily dispositive in future cases." 561 U.S. at 259 (quoting *IIT v. Cornfeld*, 619 F.2d 909, 918 (2d Cir. 1980)). The Second Circuit has acknowledged this Court's criticism, saying, "The Court criticized our Circuit's use of the conduct-and-effects test . . . as unpredictable and difficult to administer." *Parkcentral*, 763 at 210 (citing *Morrison*, 561 U.S. at 257-59). The Second Circuit has admitted that their holdings in both *Parkcentral*, and its predecessor *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60 (2nd Cir. 2012), "have *elaborated on the standards set forth in Morrison*" and that those plaintiffs "might conceivably be able to draft amended complaints that would invoke a domestic application of § 10(b)." *Parkcentral*, 763 F.3d at 218 (emphasis added).

The Second Circuit has admitted their *Parkcentral* test produces unpredictable and varying results, and thus show they have ignored the intent of *Morrison*. Because of this, "no Second Circuit case, nor any other Circuit, has applied *Parkcentral*'s rule." *Stoyas*, 896 F.3d at 950 n.22. This trend of nonapplication should persist here because *Parkcentral*'s additional requirements are neither supported by *Morrison*, nor the Security Act of 1933's language. Instead, the Ninth Circuit's view should be applied because it is truer to this Court's intent in *Morrison* and leads to a simple and predictable application by courts, businesses, and investors.

B. Even if the domestic nature of the ADR transaction is not sufficient, the court should apply Rule 10b-5 in this case because the transaction was not predominately foreign.

If this Court choses to consider *Parkcentral*'s "predominately foreign" analysis, the circumstances surrounding the ADR transaction should still subject Petitioner's claim to Rule 10b-5. *Parkcentral* suggests that when determining if conduct is domestic, courts must "make their way with careful attention to the facts of each case." 763 F.3d at 217. *Parkcentral* does not specifically say which factors are important but suggests that cases build off of one another to determine what facts are substantial for labeling a transaction as either "predominately foreign" or "permissibly domestic." *Id.* 217-18.

When sufficiently distinguishable facts exist, the Second Circuit has "declined to extend the *Parkcentral* analysis." *In re Platinum & Palladium Antitrust Litig.*, No. 1:14-cv-9391-GHW, 2017 WL 1169626, at *27 n.13 (S.D.N.Y. Mar. 28, 2017) (relating to commodity derivative securities). In *Atlantica Holdings, Inc. v. BTA Bank JSC*, the court made the distinction that "[g]iven the differences in the nature of the securities involved in Parkcentral from the Subordinated Notes at issue here, . . . Plaintiffs have adequately pled that the Exchange Act applies." No. 13-CV-5790, 2015 WL 144165, at *8 (S.D.N.Y. Jan. 12, 2015). Another court distinguished their case from *Parkcentral* saying that BBSW[1]-based derivative securities were subject to Rule 10b-5 because the defendant's intention was to deceive share and derivative holders, whereas the *Parkcentral* defendant's objective was to permit the takeover from another foreign company. *Dennis v. JPMorgan Chase & Co.*, 343 F. Supp. 3d 122, 182 (S.D.N.Y. 2018).

[1] BBSW is the Bank Bill Swap Reference Rate. The BBSW is a rate set in Australia that is used in the United States and other countries to help price certain financial derivatives.

This intention ultimately determined the person who was harmed based on their respective ownership rights with the securities.

The Court should not apply a *Parkcentral* analysis because the Alcollezione ADR transaction is a far cry from the transaction in *Parkcentral*. The courts distinguished subordinated notes in *Atlantica* and the derivative securities in *Dennis* from the swaps in *Parkcentral*. Alcollezione's ADR is similarly distinct from *Parkcentral* swap in that (1) a swap's value does not derive from an underlying security, while an ADR's value does; (2) swaps do not have exchanges to help regulate them, while ADRs do; (3) the *Parkcentral* swap was traded on a foreign exchange, while the Alcollezione ADR was traded in the United States (R. at 4); and (4) the defendant in *Parkcentral* did not know about the swap, while the Alcollezione did know about the ADR (R. at 4). *See Stoyas*, 896 F.3d at 950. All these distinctions made by the Second Circuit suggest that another distinct transaction, like the ADR in this case, should be distinguished from the facts of *Parkcentral* as well.

The different outcomes in *Stoyas* and *Parkcentral* can be explained by differences in the facts of each respective case. *Parkcentral* cautioned that their analysis "depends in some part on the particular character of the unusual security at issue." 763 F.3d at 202. In *Stoyas*, the defendant company was trading shares in Japan through the Tokyo Stock Exchange, where they were then sold as unsponsored ADRs in America. 896 F.3d at 939. The court determined that even if the issuing company did not engage in "formal participation" or "acquiescence" in the creation of the ADRs, *id.* at 941, they were still subject to Rule 10b-5, *id.* at 950. The court reasoned this based on an ADR's extreme similarity to the underlying stock the ADR was representing. *See id.* at 952. This is distinct from the securities in *Parkcentral*, where the court ruled a swap agreement referencing foreign shares was not subject to Rule 10b-5. 763 F.3d at

214. In *Parkcentral,* the company whose shares were involved in the swap agreement had no idea about the swap's existence. *Id.* at 204.

The facts surrounding the ADR here are nearly identical to *Stoyas,* and thus the transaction was permissibly domestic. Both the *Stoyas* ADR and the Alcollezione ADR are virtually identical because they both allow American investors to invest in foreign companies. In *Stoyas*, the court believed that a company's participation in the ADR's creation was not relevant since an ADR was functionally operating as a share of common stock and the company was aware of the ADR's existence. This reasoning should translate to Alcollezione stock, as the rises and falls of the security and ADR price have operated practically as one. (R. at 6.) In addition, Alcollezione was told about ADRs on two occasions (R. at 3-4) and were knowledgeable that Alcollezione ADRs were being traded in the United States (R. at 4). As *Stoyas* noted, the swaps being traded in *Parkcentral* were not tied to the value of the underlying security, nor did the defendant know about the swap's existence. The Petitioners' claim, based on the security's similarities and the company's knowledge, is far more akin to the transaction in *Stoyas* than in *Parkcentral*.

Alcollezione's refusal to sponsor its ADR should not give it extra protections from Rule 10b-5 liability. Sponsoring an ADR already comes with obligations such as the issuing company being required to pay costs to the facility trading the ADRs. American Depository Receipts, 56 Fed. Reg. 24,420, 24,422 (May 30, 1991). Even less incentives would exist for a company to sponsor an ADR if sponsorship meant a company would be lowering a drawbridge to let potential lawsuits in. To ignore the knowledge a defendant had about their company's investors would contravene *Parkcentral*'s standard because there, the company had no knowledge of the swap in question. Here Alcollezione clearly knew about the outside investors that could be

harmed. (R. at 4.) The Respondent knew they were benefitting off of U.S. investments, regardless if the ADR was sponsored or unsponsored. By benefiting from American investors, Respondent's conduct was therefore sufficiently domestic.

Foreign companies' need only minimum involvement with the U.S. to apply Rule 10b-5. In *Giunta v. Dingman,* an American wired money to a Bahamian businessman for a hospitality venture in the Bahamas after listening to a fraudulent solicitation in New York. 893 F.3d 73, 76-77 (2d Cir. 2018). The transaction was permissibly domestic even though the transaction was meant to support the development of bars and restaurants in the Bahamas, the associated entities were incorporated in the Bahamas by a Bahamian lawyer, and all records were maintained in the Bahamas. *Id.* at 82. The fact that both parties originally met in New York and communications were directed to New York was sufficient for the court to apply Rule 10b-5. *See id.* at 82-83. Another foreign company translated its public disclosures into English on their website in hopes of soliciting investments from the United States. *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 2672 CRB, 2017 WL 66281, at *6 (N.D. Cal. Jan. 4, 2017). The court said this was an instance of the German company's conduct seeping into the United States. *Id.*

The Respondent's involvement in the U.S. market is sufficient to apply Rule 10b-5. Respondent's consistent engagements with the United States shows that they likely intended to reap the benefits from their ADRs trading in the United States. The Respondent accompanied her fellow executives to visit New York. (R. at 3.) Alcollezione intentionally expanded its markets into the United States and consciously understood that their product was popular among young Americans. (R. at 3.) These continual overseas business interactions show Alcollezione's intention to engage with the United States, especially considering they knew the exact market

sector their product was affecting. The executives even expressed that they may move back to the United States one day. (R. at 4.) This engagement is far more than the sole meeting and few remote communications that took place in *Giunta*. *Giunta* did not have real cross-border business take place aside from wire transfers. In addition, Alcollezione posted "Investor Relations" materials on its website in English (R. at 3), likely to target American investors because the CEO and CFO had connections from their time there (R. at 1). This is similar to the English posting the company in *Volkswagen* made to target American investors. Alcollezione, through these actions, appeared to target America in a way that should subject the Petitioners' claim to Rule 10b-5.

The ADR transaction was not predominately foreign because Alcollezione's leadership knew their ADRs were being traded in the United States and they ultimately benefited from American investment. Other cases within the Second Circuit align with this interpretation as well. For these reasons, the court should apply Rule 10b-5 to the Petitioner's claim because it is permissibly domestic.

II. PER *LORENZO*, RESPONDENT SHOULD BE SUBJECT TO PRIMARY LIABILITY UNDER RULE 10B-5(A) OR (C), EVEN THOUGH SHE WAS NOT TECHNICALLY THE "MAKER" OF THE FALSE AND MISLEADING STATEMENTS FOR PURPOSES OF RULE 10B-5(B) AS DEFINED IN *JANUS*.

[This section is omitted].

CONCLUSION

For the reasoning herein, Petitioners respectfully request this Court request this Court to reverse the decision of the United States Court of Appeals for the Fourteenth Circuit.

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Journal(s)	**Dickinson Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Dickinson ABA Moot Court Team**

Bar Admission

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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May 12, 2021

The Honorable Elizabeth W. Hanes
United States District Court, Eastern District of Virginia
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Dear Judge Hanes,

I am a second-year student at Penn State Dickinson Law in Carlisle, Pennsylvania, and I am seeking a clerkship with your chambers. This position particularly interests me because it is at the intersection of trial advocacy and meaningful public service that I wish to pursue during my career.

I have a long-standing passion for advocacy which dates back a decade to when I led my high school's Mock Trial Team to multiple Regional Championships and a State Title. In the following years, I continued my Mock Trial involvement as both a competitor and a coach. My experiences with Mock Trial have allowed me to develop a more complete understanding of the rules of evidence and trial procedure. These skills set me apart from my peers and would allow me to hit the ground running on day one in your chambers.

At Dickinson Law, I serve as the Managing Editor of the *Dickinson Law Review*. In this position I work directly with the Editor-in-Chief to manage the operations of Law Review, oversee the Comment Writing Program, and edit student comments for publication. As an Associate Editor, I authored a Comment that discusses application of the Public Safety Exception to cases of Cyberterrorism. My comment has been selected for publication in Volume 126, Issue 1, of the *Dickinson Law Review*.

Pursuing a career in public service is a calling for me. My philosophy on life can be summed up in the words of President H.W. Bush when he said, "There could be no definition of a successful life that does not include service to others." I believe the experience of working for you, and learning from your example, would be invaluable as I pursue a career in public service.

It would be an honor to be offered a position with your chambers. I can assure you that no one will be more diligent or work harder. Thank you for your time and consideration. I can be reached by phone at 716-901-1931 or by email at mps6411@psu.edu.

Sincerely,

Mitch P. Snyder

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